92-1029

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SAM SKURNICK,

Petitioner,

v.

AL AINSWORTH,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

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December 15, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Does this Court now recognize "arbitrary or capricious" or "irrational" as valid grounds for vacating an arbitration award? If so, what standards have been established for these grounds, and does the decision of the Eleventh Circuit panel in this case conform to such standards?

2. Did the Eleventh Circuit panel exceed its powers in vacating an arbitration award by stating it was "arbitrary or capricious" on the basis of a clearly nonexistent provision in the statute cited by them as a basis for their ruling?

3. May a Court of Appeals vacate an arbitration award on the ground that it is "arbitrary or capricious" when neither the Respondent nor the district court raised this issue in the course of the proceedings?

4. Does the decision of the Eleventh Circuit panel conflict with precedents established by the Eleventh Circuit and that of other Circuit Courts in previous rulings on the same issue?

5. In a case where the parties agreed to give arbitrators unlimited authority to adjudicate their claims, did the Eleventh Circuit panel violate the provisions of 9 U.S.C. § 11 in confirming the district court's judgment against this Petitioner that effectively modified the arbitration award on none of the grounds specified in 9 U.S.C. § 11, and which did not conform to the intent of the arbitrators, and where the jurisdiction of the district court was invoked on the basis of 9 U.S.C. § 10 which deals solely with grounds for vacating an arbitration award? Did such a judgment under these circumstances deprive this Petitioner of property without "due process," a right granted to him by the Fifth amendment to the Constitution?

6. Did he decision of the Eleventh Circuit panel rely on interpretations of the law, contrary to well-established Supreme Court rulings?

7. Was the Eleventh Circuit justified in denying me the opportunity to supplement the record with the arbitrators' exhibit presented at the arbitration hearing, and which was omitted from the record of the exhibits presented to the district court over my protests, and after I made reasonable efforts to have the district court insert this exhibit in the record?

8. Does the reasoning of the Eleventh Circuit panel in its decision, such as it may be, merit it becoming a standard for adjudicating future arbitration cases that may come before the courts?

9. Does the decision of the Eleventh Circuit panel conflict with the best interests of the government?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reprinted in Appendix A.

The affirmation of the certified question put to the Florida Supreme Court by the Eleventh Circuit in the positive with one dissenting Justice is shown in Appendix D.

The judgment of the District Court is shown in Appendix B.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered May 18, 1992.

A timely petition for rehearing based upon an extension of time granted by the court to file such a petition, was denied on August 4, 1992.

Associate Justice Anthony F. Kennedy on October 9, 1992 by order granted this Petitioner an extension of time to and including December 15, 1992 to file this writ of certiorari.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit Court of Appeals is believed to be 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Respondent invoked the jurisdiction of the District Court under the provisions of Title 9 U.S.C. § 10, dealing with the grounds for vacating an arbitration award. 9 U.S.C. § 10 in its entirety reads as follows:

> § 10. Same; vacation; grounds; rehearing
>
> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality of corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within whch the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(July 30, 1947, ch 392, § 1, 61 Stat. 672.)

9 U.S.C. § 11 which was not invoked, but which is involved in this case deals with the grounds on which an arbitration award may be modified by a District Court reads in its entirety as follows:

§ 11. Same; modification or correction; grounds, order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbirators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

(July 30, 1947, ch 392, § 1, 61 Stat. 673).

Florida Statute 517.12 Registration of dealers, associated persons, investment advisers and branch offices.—

> (1) No dealer, associated person, or issuer of securities shall sell or offer for sale any securities in or from offices in this state, or sell securities in this state to persons of this state from offices outside this state, by mail or otherwise, unless the person has been registered with the department pursuant to the provisions of this section.

The United States Securities Exchange Act of 1934, Section 78c, Definitions and Application, is involved because of the following definitions of "brokers" and "dealers."

> "(4) The term "broker" means any person engaged in the business of effecting transactions in securities *for the account of others*, but does not include a bank."

> "(5) The term "dealer" means any person engaged in the business of buying and selling securities for *his own account*, through a broker or otherwise, but does not include a bank, or any person insofar as he buys or sells securities for his own account, either individually or in some fiduciary capacity, but not part of a regular business."

The Constitution of the United States, fifth amendment, states: "No person shall . . . . be deprived of . . . . property, without due process of law;" Petitioner invokes the fifth amendment because the decision of the Eleventh Circuit deprived him of property without due process of law.

STATEMENT OF THE FACTS AND OF THE CASE

This is a case in which the Eleventh Circuit Court of Appeals (the panel) affirmed the vacatur and modification of an arbitration award brought to the jurisdiction of the District Court based upon Title 9 U.S.C. § 10 which deals solely with the grounds for vacating an arbitration award. Title 9 U.S.C. § 11, which deals with the grounds for modification of an arbitration award

was not invoked in this case. The pertinent facts of the case taken from the record follow.

In January 1976, Al Ainsworth, a Florida resident, *solicited* my services by mail to manage for him *on a discretionary basis*, a *net* investment of *$1,100*. In January 1985, when Ainsworth terminated my discretionary authority over his account, its value was *$12,000*. In August 1986, Ainsworth filed a *Verified Statement of Claim* against me with the National Association of Securities Dealers *to be settled by arbitration*. He claimed that because I was not registered in Florida he was entitled to rescind the trades made on his behalf which he alleged at a hearing had $54,000 in losses, and keep the trades which resulted in $65,000 in profits; and that he was entitled to additional punitive damages, interest, and attorney fees because of deceit, untruthfulness, fraud, and other misrepresentations I made *in conversations with him*.

Ainsworth was legally deaf. It was *impossible* for me to communicate with him by *conversation*. On that basis I filed a counterclaim against him citing that fact as proof that he had filed a fraudulent Verified Complaint. I made a detailed reply to all his claims and allegations and transmitted this reply with sixteen (16) supporting documents to the arbitrators for their study and consideration. A hearing was held before three professional arbitrators which included an attorney and *a former stockbroker* familiar with the practices in the industry.

The arbitrators opened the hearing by submitting in evidence *the agreement by both parties to accept their decision as final*, Ainsworth's Verified Statement of Claim, and my reply including the sixteen documentary exhibits to support my reply: and labeled all these documents as *Arbitrators' Exhibit No. 1*.

Ainsworth testified under oath. He confirmed to the arbitrators that he could only establish a net investment

of $1,100. He testified that he never saw or spoke to me before; that he could not use the telephone; and that I never sent him any letters that could be considered untruthful, fraudulent, deceitful, or unethical. He complained that I picked good stocks for him but sold them too soon.

I testified that I was not registered in Florida and that prior to accepting Ainsworth's funds the Florida banking department had issued a publication that their registration requirements applied only for sales made *in* Florida and that they had no authority for sales occurring outside the state. I exhibited the document to the parties as I read from it. Ainsworth's attorney, (Forkey) then said that the statute had been changed to include brokers with offices outside the state selling securities in Florida. I replied that the changes may have been to cover brokers with offices outside the state who personally or through agents actually sell stock to Florida residents in Florida. When Forkey presented copies of trade confirmations sent to Ainsworth, I called the arbitrators' attention to the fact that all of them had the notation that I acted as a broker in these transactions, and not as a dealer. I indicated that it was the custom and usage in the securities industry to differentiate between broker-dealers who acted as brokers, as dealers, or in both capacities. I was a registered broker-dealer who acted solely in the capacity of a broker.

At the conclusion of the hearing both parties testified that they had a fair hearing.

On June 2, 1987 the arbitrators made their award, 86-1021, in which they found for the Claimant but that he sustained no damages; and that his claim for punitive damages and interest was denied; and that each party should bear its own costs and expenses including attorneys' fees.

On June 22 Forkey petitioned the District Court under authority of 9 U.S.C. 10 to vacate partially and modify

the award even though 9 U.S.C. § 10 deals solely with grounds for vacating an aribtration award. He claimed that the arbitrators were evidently partial to me, and then later modified his claim to include that they acted with manifest disregard of the law.

The District Court held a hearing on January 8, 1988. Forkey at that time presented to the court *only* the exhibits he produced in evidence at the arbitration hearing, alleging that they included *all* the exhibits presented at the arbitration hearing. The arbitrators' exhibit, which is clearly mentioned in the transcript of the proceedings and which included my reply and exhibits, was not introduced. I protested this exclusion to the court who appeared to accept the Forkey version of what exhibits were presented at the arbitration hearing.

I testified as a witness. I told the court that Ainsworth was truthful at the arbitration hearing and it was obvious at that hearing that Forkey had prepared the fictitious statement of claim and induced Ainsworth to swear to its truthfulness without Ainsworth realizing that fact. The arbitrators, being thoughtful, intelligent individuals took this into consideration and refused to hold Ainsworth responsible for the fraudulent act committed by Forkey. Therefore, they dismissed my counterclaim against Ainsworth by finding for him. Despite a protest by Forkey to my testimony, he declined to question me while I was under oath as a witness.

The district court issued an "Order of Remand" and instructed the arbitrators to clarify which of the five counts Skurnick was liable in award #86-1021. The arbitrators reconvened as ordered by the court and issued a revised award which said:

> "And having now considered all evidence respecting each and every claim submitted for arbitral determination . . . , we find that the Respondent (Skurnick) was negligent in the handling of the Claimant's account, however, the Claimant sustained no damages;

> And therefore, we concluded that the Claimant is not entitled to recover any compensatory damages nor any punitive damages and interest; . . . .
>
> And that each party shall bear its own costs and expenses including attorneys' fees;
>
> And, further it is our conclusion that the Claimant has not established his right to recover on any of the other claims filed in this proceeding."

The district court later issued his decision which was to vacate the arbitration award on the allegation that it was in manifest disregard of the law, and issued a judgment in favor of Ainsworth against Skurnick for the amount of $54,108.78 plus interest.

I appealed this decision to the Eleventh Circuit who ordered a hearing. The panel opened the hearing by stating that they were familiar with all the arguments contained in the briefs. I told the panel that I had nothing more to add than what was in my brief and I was prepared to answer any questions put to me. I concluded by saying that the purpose of the Florida law was to prevent fraudulent sales of securities, and that throughout my investment career I had conducted by business in a 100% ethical manner.

One question put to Ainsworth's attorney was: "You say Skurnick sold stocks to Ainsworth in Florida. Why can't we say that Ainsworth bought stocks from Skurnick in Connecticut?"

The court then certified the question as to whether I had sold stocks *in Florida*, given the facts in the case, to the Supreme Court of Florida. That Court replied in the affirmative *with one Justice dissenting.*

The Eleventh Circuit panel then invited comments on the Florida Supreme Court's decision; on the Eleventh Circuit's ruling in the case of *O.R. Securities v. Professional Planning Assoc.*, 857 F.2d 746 (11th Cir. 1988); and on 9 U.S.C. § 10.

I replied that the Florida Supreme Court's decision was a judicial interpretation of a Florida statute and did not effect the issue before the Eleventh Circuit which was, whether the District Court was justified in vacating an arbitration award based upon manifest disregard of the law by a panel of three arbitrators. The panel had already stated the position taken by the U.S. Supreme Court in *Wilko v. Swan* saying, "Courts are generally prohibited from vacating an arbitration award on the basis of errors of law or interpretation."

I called to the panel's attention that one justice on the Florida Supreme Court dissented from the majority opinion, and that his dissent was, therefore, proof that there was no *manifest* disregard of the law by the arbitration panel in making their award.

I also commented that Florida statute 517.12, as interpreted by the Florida Supreme Court and enforced in Florida, was effectively a law by the State of Florida regulating commerce between the states, a power not granted to the states by the United States Constitution.

My comments in the case of *O.R. Securities v. Professional Planning Assoc.*, was that it stated that *the Eleventh Circuit never adopted, and even rejected, manifest disregard of the law as a ground for vacating an arbitration award*, and that the District Court for the Southern District of Florida was within the Eleventh Circuit. I noted that the decision stated, "If a court is to vacate an arbitration award on the basis of manifest disregard of the law, there must be some showing in the record, other than the results obtained, *that the arbitrators knew the law and expressly disregarded it.*"

My comments on 9 U.S.C. § 10 were that the order issued by the District Court vacating the arbitration award did not conform with any of the grounds specified in that law.

At a later date in a Notice of Supplemental Authority I called the panel's attention to the Eleventh Circuit's

decision in *Robbins v. Day* rendered February 27, 1992 which stated in different parts:

> ". . . The Federal Arbitration Act presumes that reviewing courts will confirm arbitration awards and that the court's review of arbitration process will be severely limited."
>
> ". . . , when a district court goes against the presumption that it should affirm an arbitration award, we must review de novo to protect the integrity of the arbitration process."
>
> "The statute does not allow an abritration award to be vacated solely on the basis of error of law or interpretation but requires something more, such as misconduct pertaining to the proceedings on the part of the arbitrators or the parties."
>
> "*Following Eleventh Circuit precedent, we decline to adopt the manifest disregard of the law standards.*"

On May 18, 1992 the Eleventh Circuit panel affirmed the decision vacating the arbitration award on the basis of manifest disregard of the law, saying: 'Although this may have been an incorrect standard under the law of this Circuit, the decision of the district court may be upheld on the ground that the ultimate decision of the arbitration panel denying damages was "arbitrary or capricious." '

A timely petition for rehearing was filed, and denied.

An untimely suggestion for a rehearing in banc was then filed with the suggestion that if it merited consideration, that fact would be good cause to accept it despite untimely filing. Its consideration was denied on the grounds that it was untimely.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The decision of the Eleventh Circuit Court of Appeals will set a precedent for courts to follow in adjudicating cases involving the Arbitration Act with regard to 9 U.S.C. § 10 and 9 U.S.C. § 11. The decision in this case is contrary to past rulings of the United States Supreme Court on the issues involved. It is contrary to past rulings by the Eleventh Circuit. It is contrary to the rulings and standards set by other circuit courts on the issues in this case. It is clearly based upon a nonexistent provision in the statute cited by them as the reason for their action. It itself is contradictory. It is contradictory to another decision by the same court in the same case. It is contradictory to the decision of the district court which it affirmed. It is arbitrary and irrational. It is completely devoid of valid facts and valid reasons to support their decision. The decision of the Eleventh Circuit Court of Appeals panel (the panel) has so far departed from the accepted and usual course of judicial proceedings that the best interests of the government requires the Supreme Court to exercise its power of supervision in this case. The foregoing statements could best be proven by presenting a detailed analysis of the panel's decision in this case, on a point by point basis, starting with their first paragraph.

I. ANALYSIS OF THE ELEVENTH CIRCUIT DECISION

The panel's decision states:

> In this suit by a customer against a securities broker, the district court upheld the decision of an arbitration panel that Sam Skurnick, the securities broker, was negligent in handling the account of his customer, Al Ainsworth. *Since this violated Fla. Stat. Ch. 517.12, however, the district court awarded Ainsworth damages under the mandatory damages provision of Fla. Stat. Ch. 517.211, which the arbitration panel failed to do.*

The district court stated the Florida Statute in its decision saying:

> Florida Statute Para. 517.12 provides in relevant part: Registration of dealers, associated persons and investment advisors.
>
> (1) No dealer, associated person, or issuer of securities shall sell or offer for sale any securities in this state, or sell securities in this state to persons thereof from offices outside this state, by mail or otherwise, unless the person has been registered with the department pursuant to the provisions of this section.

Note that there is clearly no provision regarding negligence in this statute. The fact is that chapter 517 of Florida law does not contain the word "negligence." It is clear from the statute that a finding of negligence did not indicate a violation of Florida Statute 517.12, as stated in the panel's decision, and that the finding of negligence was not the reason for the district court's vacatur of the arbitration award on the basis of manifest disregard of the law as also stated in the panel's decision.

The district court's decision included the following statement:

> This Court's Order of Remand stated:
>
> . . . if a statutory violation is found, damages should be awarded. However, if the liability was for a common law violation, rather than a statutory violation, then an award of damages is not mandatory.

Later, in its decision the district court states:

> Thus, pursuant to this court's order, the arbitration panel clarified its earlier ruling by explaining that: 1) it had found Skurnick negligent; 2) Al Ainsworth sustained no damages on account of Skurnick's negligence; and 3) Ainsworth failed to prove any of his other claims, including violation of Fla. Stat. § 517.12. This court finds that there exists no viable reason to vacate the arbitration panel's

> award as it relates to the finding of negligence or damages attributable to Skurnick's negligence.

The damages attributable to Skurnick's negligence was "no damages" as stated by the arbitration panel in its award.

The foregoing extract from the district court decision clearly shows that the panel was in error when they stated that because of the finding that Skurnick was negligent, the district court awarded Ainsworth damages. The panel's decision and the district court's decision are clearly contradictory as to the effect of the finding of "negligence."

The clear misapprehension by the panel as to the provisions of Fla. Stat. Sec. 517.12 and the true reason for the vacatur of the arbitration award by the district court appear to be the principle basis for their decision that the arbitrators acted in an "arbitrary or capricious" manner, an allegation that is disproved by the facts of the statute cited and in the district court's decision.

In the second paragraph of its decision the panel states that the district court sent the decision back to the arbitrators because it was "without adequate explanation of how the conclusion was reached in light of Fla. Stat. Ch. 517.12 and the mandatory provisions of Fla. Stat. Ch. 517.211." This was not so. The arbitrators were instructed by the court to clarify their decision, with the district court in his order of remand saying:

> If a statutory violation is found, damages should be awarded. However, if the liability was for a common law violation, rather than a statutory violation, then an award of damages is not mandatory. Without engaging in speculation, it is impossible for this court to properly assess whether the arbitrators imposed statutory liability on Sam Skurnick. Until such a clarification is made, Petitioner cannot begin to prove nor can this court determine whether the arbitration panel was evidently partial or acting

> in manifest disregard of the law in not awarding Al Ainsworth damages.

In its order of remand, the district court states:

> . . . this Court is disturbed by the arbitration panel's conduct. As a matter of fairness, the parties are entitled to know the specifics of the decision and the rationale. In essence the vagueness invites speculation and emasculates effective judicial review.

The Eleventh Circuit panel in the last sentence of the second paragraph justified the remand of the first arbitration award by implying that it was "ambiguous." The remand by the district court of the first award and the panel's justification of that order of remand was contrary to the ruling by the U.S. Supreme Court in *Wilko v. Swan*, 74 S.Ct. 182 (1953) which states specifically concerning an arbitration award: ". . . their award may be made without explanation of their reasons and without a complete record of their proceedings." The Supreme Court reaffirmed this ruling in *Bernhardt v. Polygraphic Co. of America*, 76 S.Ct. 273, 276 (1956) when it ruled, "Arbitrators . . . need not give the reasons for their results;", and again in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 80 S.Ct. 1358, 1361 (1960) the Supreme Court ruled, "Arbitrators have no obligation to give their reasons for an award. To require opinions free of ambiguity may lead aribtrators to play it safe by writing no supporting opinions."

The arbitrators were conscientious, professional, fairmined, knowledgable, thoughtful and dedicated persons. They had professional experience in arbitration cases and arbitration law. They included an attorney and former stockbroker. Their first award was absolutely clear, and not ambiguous as suggested by the panel's decision. This statement can be verified by examination of their first award as shown in Appendix J. What was not clear was the reason for their award, despite the fact that the award itself contained the reason. The award stated that

the Claimant sustained no damages. This fact made all the other claims moot. If by chance there was a violation of Florida Statute 517.12 so that the Claimant was entitled to damages under Fla. Stat. 517.211, it did not matter because the Claimant sustained no damages.

Circuit courts have ruled that it is the function of arbitrators to determine what damages exist and not for the court to determine them.

In the case of *Orion Shipping v. Eastern States Petroleum Corp.*, 312 F.2d 299 (2nd Cir. 1963), *cert. den.*, 83 S.Ct. 1679, the court ruled that the manner of computing damages was for the arbitrator and not for the court.

In the case of *Diapulse Corp. of America v. Carba Ltd.*, 626 F.2d 1108, 1110 (2nd Cir. 1980), the court ruled, "Section 11(c), . . . does not license the district court to substitute its judgment for that of the arbitrators."

The panel in Para. [1] states that the district court stated the Florida law clearly. Such being the case, one may ask why the panel attributed the provision concerning negligence to the law, when it clearly did not exist in the district court's statement of the law?

The panel in this paragraph states that the briefs of the parties and their own research revealed no clear precedent in the Florida court decisions concerning when a sale of securities is considered to have been made in Florida. In light of this statement on what basis was the panel justified in affirming the district court's decision that the arbitrators acted with manifest disregard of the law when at least one of the three essential provisions of the statute was not absolutely clear?

The panel continued by saying, "We, therefore, certified the question to the Florida Supreme Court . . ."

The panel's certification of the question to the Florida Supreme Court as to whether Skurnick sold stocks in Florida is in itself proof that the provisions of the law

and its interpretation were not crystal clear so that the arbitration panel could not be accused of acting in manifest disregard of the law. In this case we are dealing with a claim to be settled by arbitration where the U.S. Supreme Court has ruled that arbitrators are not held to a correct interpretation of the law, and where the law itself does not govern unless it could be shown that the arbitrators knew the law and its correct interpretation, and then knowingly proceeded to disregard the law in making their award.

The panel in its decision, Para. [1], states regarding the decision of the Florida Supreme Court; "That Court, in its answer to the certified question, has now held that the district court was correct in its instructions to the arbitration panel. The statement is contrary to the facts in that it implies that the district court instructed the arbitrators to find that Skurnick violated Fla. Stat. 517.12, and to determine the amount of the award to which Ainsworth was entitled. The district court gave no such instructions to the arbitrators in his order of remand. His instructions to the arbitrators were to determine if Skurnick violated Fla. Stat. 517.12, in which case by Florida statute Ainsworth had the option to rescind whatever purchases he chose. The arbitrators in their revised award followed the instructions of the district court and stated that Skurnick was negligent but Ainsworth sustained no damages as a result of Skurnick's negligence, and had not established his right to recover on his other claims including violation of Fla. Stat. 517.12.

The Florida Supreme Court was merely asked to certify the question as to whether Skurnick sold stocks in Florida based upon the facts presented to them. It was not the function of the Florida Supreme Court to determine whether Skurnick violated Fla. Stat. 517.12 or what trades were to be rescinded. This was the function of the arbitrators to decide and not the function of the

Florida Supreme Court, nor the district court, nor the Eleventh Circuit panel to decide. It was a decision for the arbitrators to decide. Arbitrators' decisions according to the ruling of the Supreme Court, may not be set aside for errors of fact or in the correct interpretation of laws. The real significance of the Florida Supreme Court decision in this case is twofold. Firstly, the fact that one Justice of that court dissented from the majority decision is proof that the law was not absolutely clear, and therefore the arbitrators could not have acted with manifest disregard of the law. Secondly, the fact that the panel felt the need to certify the question as to whether my activities, based upon the facts presented, constituted sales of securities in Florida, is additional proof that it was not absolutely clear that the alleged sales occurred in Florida. This fact being additional proof that the arbitrators did not act with manifest disregard of the law. Both facts may be also considered to be proof that the arbitrators did not act in an arbitrary or irrational manner.

The issue in this case is not whether I did, or did not, violate Fla. Stat. 517.12. The issue is whether it was clear that the arbitrators knew that I violated that statute, and knowingly refused to allow Ainsworth to rescind those transactions of his choice. The mere fact that there was a question as to whether I sold stocks in Florida under the circumstances; whether I acted as a dealer when all transactions specified I acted as a broker; and whether I sold stocks to Ainsworth as a dealer, when I owned none of the stocks purchased on Ainsworth's behalf; created a reasonable doubt in the minds of the arbitrators that I had violated Fla. Stat. Sec. 517.12.

The panel in the last sentence of paragraph [1] says, "So we now know that Skurnick violated Chapter 517.12 and that Ainsworth is entitled to mandatory damages under Chapter 517.211." The key word in this sentence is "now". The implication of this sentence is that the

panel did not know previously what they claim to know *now* after the decision rendered by the Supreme Court of Florida. If the panel did not know it previously how can they claim that the arbitrators knew it, and ignored it, when the arbitrators rendered their award long before the Supreme Court of Florida rendered its decision?

In Para. [2] the panel's decision confirms that courts are prohibited from vacating arbitration awards on the basis of errors of law or interpretation, and the express terms of 9 U.S.C. §§ 10 and 11 have often been deemed the exclusive grounds for vacation or modification. The question arises, therefore, why they certified a question on the interpretation of Florida law to the Supreme Court of Florida in the first place when the U.S. Supreme Court has ruled that arbitrators may not be bound to a correct interpretation of the law? This was not a suit that originated in a court of law. This was a claim where both parties agreed to accept the decision of the arbitrators as final. The activities and statements of the panel appear to be contradictory and irrational.

The decision here confirms that the Eleventh Circuit has in its previous decisions rejected the manifest disregard of the law standard as a basis for vacating an arbitration award, and confirmed by citing the opinions of other circuits on this issue that the standards for vacating an arbitration award by the district court did not conform to the standards set by other circuits. The question is therefore raised why they affirmed a decision by the district court to vacate the arbitration award on the basis of manifest disregard of the law? Again the panel's decision appears to be contradictory and irrational.

The panel's decision continues in [3] to say, ". . . although great deference is normally accorded an arbitration award, an award that is arbitrary or capricious is not required to be enforced. An award is arbitrary

and capricious only if "a ground for the arbitrators' decision cannot be inferred from the facts of the case." The panel also quotes the Eleventh Circuit's decision in *Drummond Coal*, 748 F.2d at 1497 stating an "award may be vacated if irrational", and says in Para. [4] "Such is the case here." The panel continues by saying, "There is simply no explanation in the award itself why damages were not awarded." This is a statement clearly contrary to the facts. While the Supreme Court has ruled that arbitrators need not give any reasons for their award, the arbitrators, in this case, gave a very rational reason for their award which can be readily confirmed by examining their award shown as Appendix I. The award states, ". . . the Claimant suffered no damages; . . . it is our conclusion that the Claimant has not established his right to recover on any of the other claims filed in this proceeding." The panel even quotes the award saying; ' "the Claimant sustained no damages, and therefore, we conclude the Claimant is not entitled to recover damages. This is a non-sequitur for which there is no basis.", implying that there was an inconsistency in the arbitrator's reasoning. On the contrary, the reasoning of the panel was inconsistent. In its Statement of the Facts, part III of its Certification request to the Florida Supreme Court reproduced here as Appendix C, the panel said:

> "Mailing funds to New York where Skurnick is a registered broker, Ainsworth made a net investment of $1,100.00 which approximated $12,000.00 when Ainsworth chose to terminate Skurnick's discretionary authority over the securities account."

These facts show that there was a reasonable basis for the arbitrators to say that Ainsworth sustained no damages. The figures show he made a profit of $10,900 on his initial net investment of $1,100. Having decided that Ainsworth had not established as a fact that Skurnick violated Florida Statute 517.12 it became a moot issue

whether Ainsworth was entitled to rescind his unprofitable trades under 517.211. The district court did not instruct the arbitrators that if they found Skurnick negligent, they must rule that Skurnick violated 517.12 as implied by the panel in its first paragraph, and again in this paragraph.

The panel continues by saying: "The arbitrators did not reflect any disagreement with the district court's statement of the law." It is unclear as to what "statement of the law" it is to which the panel refers. The only "statement of the law" by the district court in its order of remand is, ". . . the arbitration panel does not specifically state that Respondent (Skurnick) violated Fla. Stat. 517.12, a statutory provision which triggers the application of the mandatory damages provision, Fla. Stat. § 517.211." See Appendix B. This is a statement that I do not dispute.

The panel continues by saying, "Even if there was a dispute as to the application of Section 517.12 to the undisputed facts of this case, there is none now, since the Florida Supreme Court certification." The arbitrators made their award prior to the Florida Supreme Court certification. This was a claim to be adjudicated by the rules of arbitration and not a suit to be governed by the rules of law. As previously stated the Supreme Court has ruled that arbitrators are not bound by the correct interpretation of the law. The panel's reference to the Florida Supreme Court decision is therefore irrelevant.

The panel continues by saying: "We have to assume that the arbitrators decision was arbitrary or capricious for two reasons: first, it was a reasonable interpretation of the statute made by the district court in questioning the vagueness of the panel's first decision; and second, the district court told them what the law was, and their second award does not indicate that they differ with the point nor does it give any reason for not awarding manda-

tory damages." I have already presented evidence that the first award was not vague or ambiguous. It was absolutely clear. I have quoted the order of remand to show that the district court remanded the first award because the rationale of the award was not evident to the district court and that, it, therefore, emasculated effective judicial review, both reasons being contrary to past rulings of the Supreme Court. The second award gave two very clear specific reasons for not awarding Ainsworth damages. The first being that he sustained no damages, and secondly, he had "not established his right to recover on any of the other claims filed," in the proceedings.

The panel continues by saying, "Since they knew the law required damages, their refusal to grant damages is clearly arbitrary, there was no reasonable basis upon which the *(arbitration)* panel may have acted." There is absolutely no basis for the panel saying that the arbitrators knew of any law that required them to award Ainsworth damages that he did not sustain, and that their refusal to do so was an arbitrary decision. There is no explanation for the panel's statement other than their misapprehension of the provisions of Florida Statute 517.12 as revealed in the first paragraph of their decision, as well as their misapprehension of the profit that Ainsworth made on his investment which they constantly refer to as "damages", and their misapprehension of the instructions given to the arbitrators by the district court in his order of remand.

The panel's statement, "the decision (arbitrators) was simply an apparent arbitrary and capricious denial of relief with no factual or legal basis," is itself an arbitrary statement with no factual, legal, or rational basis.

Finally, in affirming the judgment of the district court, which was to vacate the arbitration award on the basis of manifest disregard of the law, and affirm the monetary judgment made by the district court against this Petitioner, the panel's decision was contrary to the past

precedent of the Eleventh Circuit, contrary to the standards established by other circuit courts for vacating an arbitration award on the basis of manifest disregard of the law, contrary to the grounds specified in 9 U.S.C. § 11 for modifying an arbitration award, and contrary to Supreme Court rulings that the only grounds for vacating or modifying an arbitration award absent manifest disregard of the law, are those specified in 9 U.S.C. § 10 and 9 U.S.C. § 11.

II. ARGUMENT

The panel in affirming the vacatur of the arbitration award by the district court did so on the allegation that it was "arbitrary or capricious." This raises several questions which should be decided by this court.

1. Inasmuch as neither the Respondent, nor the district court in its decision, raised the issue of the arbitration award being "arbitrary or capricious," and the Petitioner, therefore, not having a basis for addressing this issue in his brief to the Eleventh Circuit, was this a valid reason for the panel's affirmation of the vacatur of the arbitration award by the district court?

2. Inasmuch as "arbitrary or capricious" are not grounds specified in 9 U.S.C. § 10 as a basis for vacating an arbitration award, and the Supreme Court in *Wilko v. Swan* ruled that absence manifest disregard of the law, the grounds specified in 9 U.S.C. § 10 are the sole grounds provided by law for vacating an arbitration award, does the Supreme Court now recognize these grounds for vacating an arbitration award?

3. If these grounds are now recognized by the Supreme Court as a basis for vacating an arbitration award, what standards have been established or recognized by the courts for ruling that an arbitration award is "arbitrary or capricious"?

4. The panel in its decision suggests that an award is "arbitrary or capricious" if a ground for the arbitrator's

decision cannot be inferred from the facts of the case or if it is "irrational", citing the Eleventh Circuit's decision in *Drummond Coal* in both cases. The question now arises whether these Eleventh Circuit decisions conflict with the Supreme Court decision in *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 80 S.Ct. 1358, 1361 (1960), wherein the Supreme Court stated:

> "A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement."

This decision implies that since an arbitrator need not give the reasons for an award, vacating an arbitration award because it is alleged to be irrational, would restrain arbitrators from giving their reasons for an award, a practice that should be discouraged. For this reason vacating an award because it is "irrational" is unacceptable to the Supreme Court as a ground for vacating an arbitration award. In citing *Drummond Coal*, the panel suggested that an award is "arbitrary and capricious" if it is irrational.

The Supreme Court in *Wilko v. Swan*, 74 S.Ct. 182, 187, 188 (1953) stated:

> "In unrestricted submissions, . . . the interpretation of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation. The United States Arbitration Act contains no provision for judicial determination of legal issues . . ."

The submission of this case to the arbitrators had no restrictions. Both parties agreed in advance in writing

that they would accept the decision of the arbitrators as final.

The Eleventh Circuit in the case of *Raiford v. Merrill Lynch*, 903 F.2d 1410 (1990), made the following statements:

> "This court has never adopted the manifest-disregard-for-the-law standard."
>
> "An award is arbitrary and capricious only if a ground for the arbitrator's decision cannot be inferred from the facts of the case."
>
> ". . . the facts and claims in this case indicate that the arbitrators fashioned their award based on any number of valid reasons. We therefore hold that the award was not arbitrary or capricious."
>
> "When the parties agreed to submit to arbitration they also agreed to accept whatever reasonable uncertainties might arise from the process."

In the present case there were a number of valid reasons upon which the arbitrators could have based their decision in this case. Some of which were presented in my analysis of the panel's decision. The decision confirms that the Eleventh Circuit never adopted the manifest-disregard-of-the-law standard as a basis for vacating an arbitration award.

The following extracts from the decision in *Marshall v. Green Giant Co.*, 942 F.2d 539, 544 (8th Cir. 1991) have a bearing in this case:

> "The district court agreed with the argument that (the) award was a matter for the arbitrator, not the court, to decide."
>
> "A party does not suffer damage merely by dealing with an unregistered FCM; failure to register, without more, does not cause pecuniary loss, a potential plaintiff can collect only actual damages."

In the case before this court the Petitioner was not registered in Florida. It is alleged that he was required to do so. According to the decision in the case cited above, failure to register with proper authorities, does not in itself, entitle a Plaintiff to collect "damages" he did not actually suffer.

The decision also affirms the principle that in a case submitted to arbitrators, it was for the arbitrator(s) to decide on the awards, not the district court.

In the case of *Amicizia Societa Navegozione v. Chilean & Iodine Sales Corp.*, 274 F.2d 805, 808 (2nd Cir. 1960) the court ruled:

> "The statutory provisions, 9 U.S.C. §§ 10, 11 in expressly stating certain grounds for either vacating an award or modifying or correcting it, do not authorize its setting aside on the grounds of erroneous finding of fact or of misinterpretation of the law."

After vacating the arbitration award on the basis of manifest disregard of the law, the district court entered a judgment against the Petitioner, effectively modifying the arbitration award on none of the grounds specified in 9 U.S.C. § 11, and in a manner that did not conform with the intent of the arbitrators. The jurisdiction of the district court was invoked solely on the basis of the provisions of 9 U.S.C. § 10, which deals solely with the grounds for vacating an arbitration award. Under these circumstances did the affirmation by the Eleventh Circuit of the district court judgment deprive me of property without due process and violate my right to due process granted by the fifth amendment to the Constitution?

In the case of *Diapulse Corp. of America v. Carba Ltd.*, 626 F.2d 1108 (2nd Cir. 1980), the Court ruled as follows:

> We hold that the district court had no authority to modify the substantive provisions of the award . . . Section 11(c), which is limited to matters of form

> not affecting the merits of the controversy, does not license the district court to substitute its judgment for that of the arbitrators.

These extracts from the Second Circuit decision indicate that the Second Circuit did not authorize the district court to modify in a substantive manner the arbitration award. This is in contrast to that of the Eleventh Circuit's panel which authorized such a modification. These different rulings by different circuits on the same issue require the Supreme Court to resolve the differences.

In *O.R. Securities v. Professional Planning Associates*, 857 F.2d 742, 747 (11th Cir. 1988), the court stated:

> ". . . this circuit has never adopted manifest disregard of the law as a ground for vacating an arbitration award."
>
> "If a court is to vacate an arbitration award, there must be showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it."

In *Raiford v. Merrill Lynch*, 903 F.2d 1410 (11th Cir. 1990), the court stated:

> "An award is arbitrary and capricious only if a ground for the arbitrators decision cannot be inferred from the facts of the case. The facts and claims in this case indicate that the arbitrators have fashioned their award based on any number of valid reasons. We therefore hold that the award was not arbitrary or capricious . . ."

In this case there were numerous reasons presented to the panel in my brief and petition for rehearing that would indicate the arbitrators had a reasonable basis for fashioning their award. This was proved in my analysis of the panel's decision.

In the case of *Raybestos-Manhattan v. Amalgamated Clothing & Textile Workers*, 485 F. Supp. 387, 394 (1982 D.C. S.C.), the court said:

> "In the present case, the arbitrator looked to industry practices. . . . The utilization of industry practices . . . is clearly permissible."

In the present case, one of the arbitrators was formerly associated with the securities industry. He was familiar with the industry practice of differentiating between a "broker" and a "dealer." His reluctance to define me as a "dealer" who "sold" stocks "to Ainsworth" was permissible according to this court's ruling. The practice of the industry to differentiate between "dealer" and "broker" was also supported by federal statute definitions of these terms as shown in the statutes involved section.

CONCLUSION

I believe that on the basis of my detailed analysis of the Eleventh Circuit panel's decision, and the additional authorities and arguments presented, I have proven the validity of all the reasons I presented for granting the writ. Inasmuch as it is government policy to promote arbitration as a means of expediting justice, it would be a major setback for our judicial system if the Eleventh Circuit panel's decision became a standard for adjudicating arbitration cases.

Respectfully submitted,

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December 15, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 89-5701

AL AINSWORTH,
Plaintiff-Appellee,
v.

SAM SKURNICK,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

May 18, 1992

Before KRAVITCH, Circuit Judge, RONEY and ALDISERT*, Senior Circuit Judges.

PER CURIAM:

This case involving Florida securities law comes before this Court for the second time. We previously certified a question to the Florida Supreme Court and the undisputed facts are fully set forth in *Ainsworth v. Skurnick*, 909 F.2d 456 (11th Cir. 1990). In this suit by a customer against a securities broker, the district court up-

* Honorable Ruggero J. Aldisert, Senior U.S. Circuit Judge for the Third Circuit, sitting by designation.

held the decision of an arbitration panel that Sam Skurnick, the securities broker, was negligent in handling the account of his customer, Al Ainsworth. Since this violated Fla.Stat. ch. 517.12, however, the district court awarded Ainsworth damages under the mandatory damages provision of Fla.Stat. ch. 517.211, which the arbitration panel failed to do. The district court properly applied Florida law in finding that the violation of Fla. Stat. ch. 517.12 automatically triggers a damage award under Fla.Stat. ch. 517.211. The district court vacated the arbitration judgment as being in manifest disregard of the law. Although this may have been an incorrect standard under the law of this Circuit, the decision of the district court may be upheld on the ground that the ultimate decision of the arbitration panel denying damages was "arbitrary or capricious."

Plaintiff's original claim was submitted to arbitration before a panel of the National Association of Securities Dealers, Inc. On the first appeal to the district court of the arbitration award which denied a damage claim, the district court sent it back to the arbitration panel, stating that the decision was vague, cursory, and without adequate explanation of how the conclusion was reached in light of Fla.Stat. ch. 517.12 and the mandatory damages provision of Fla.Stat. ch. 517.211. *San Antonio Newspaper Guild Local 25 c. San Antonio Light Div.*, 481 F.2d 821, 824-825 (5th Cir. 1973) (proper to remand for interpretation an ambiguous arbitration award).

After being instructed by the district court that statutory damages are mandatory when one violates Fla.Stat. ch. 517.12, the arbitration panel's second award stated:

> [H]aving now considered all evidence respecting each and every claim submitted for arbitral determination in connection with the Respondent's position as the Claimant's broker/dealer, we find that the Respondent was negligent in the handling of the

> Claimant's account, however, the Claimant sustained no damages;
>
> And, therefore, we conclude that the Claimant is not entitled to recover any compensatory damages, nor any punitive damages and interest. . . .
>
> And, further it is our conclusion that the Claimant has not established his right to recover on any of the other claims filed in this proceeding.

[In re Arbitration between Ainsworth v. Skurnick, NASD Award 86-1021, April 8, 1988].

Although the district court stated the Florida law clearly, the briefs of the parties and our own research revealed no clear precedent in the Florida court decisions concerning when a sale of securities is considered to have been made in Florida such as to trigger mandatory damages. We, therefore, certified the question to the Florida Supreme Court pursuant to Fla. Const. art. 5 § 3(b)(6). *Ainsworth v. Skurnick*, 909 F.2d 456 (11th Cir.1990). That Court, in its answer to the certified question, has now held that the district court was correct in its instructions to the arbitration panel. *Skurnick v. Ainsworth*, 591 So.2d 904 (Fla.1991). The Court said that

> The issue in this case is whether a securities broker in Connecticut and New York is making a sale of securities in Florida under section 517.12, Florida Statutes (1989), when he or she receives an order or check by mail from a Florida resident and acts on that request by purchasing stock or mutual funds in New York.
>
> . . . .
>
> We agree with the United States District Court and find that the language in section 517.12 which states sell[s] securities in this state to persons of this state from offices outside this state, by mail or otherwise,

> expresses a clear intent to cover this type of transaction.

Id. at 904, 906. So we now know that Skurnick violated chapter 517.12 and that Ainsworth is entitled to mandatory damages under chapter 517.211.

Courts are generally prohibited from vacating an arbitration award on the basis of errors of law or interpretation, and the express terms of 9 U.S.C. §§ 10 and 11 have often been deemed the exclusive grounds for vacation or modification. *See O.R. Securities v. Professional Planning Assoc.*, 857 F.2d 742, 746 (11th Cir.1988); *Shearson Hayden Stone, Inc. v. Liang*, 653 F.2d 310, 312 (7th Cir.1981); *Diapulse Corp. of America v. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir.1980). Several courts have discussed the use of a "manifest disregard of the law" standard to vacate an arbitration award. *See Robbins v. Day*, 954 F.2d 679 (11th Cir.1992); *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056 (9th Cir. 1991); *Marshall v. Green Giant Co.*, 942 F.2d 539 (8th Cir.1991); *Upshur Coals Corp. v. United Mine Workers of America, Dist. 31*, 933 F.2d 225 (4th Cir.1991); *Advest, Inc. v. McCarthy*, 914 F.2d 6 (1st Cir.1990); *Raiford v. Merrill Lynch, Pierce, Fenner & Smith*, 903 F.2d 1410, 1413 (11th Cir.1990); *Jenkins v. Prudential-Bache Securities, Inc.*, 847 F.2d 631 (10th Cir.1988); *O.R. Securities*, 857 F.2d 742; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930 (2d Cir. 1986); *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743 (8th Cir.), *cert. denied*, 476 U.S. 1141, 106 S.Ct. 2249, 90 L.Ed.2d 695 (1986). This Circuit, however, has never adopted that standard as a ground for vacating an arbitration award. *Robbins*, 954 F.2d at 684; *Raiford*, 903 F.2d at 1412; *O.R. Securities*, 857 F.2d at 747. The cases are unclear as to whether we have ever held that it would be error to vacate an arbitration award as being in manifest disregard of the law.

Our cases do hold, however, that although great deference is normally accorded an arbitration award, an award that is arbitrary or capricious is not required to be enforced. *Robbins*, 954 F.2d at 683; *Raiford*, 903 F.2d at 1412; *United States Postal Serv. v. National Assoc. of Letter Carriers*, 847 F.2d 775, 778 (11th Cir.1988); *Drummond Coal Co. v. United Mine Workers of Am.*, 748 F.2d 1495, 1497 (11th Cir.1984). An award is arbitrary and capricious only if "a ground for the arbitrator's decision cannot be inferred from the facts of the case." *Raiford*, 903 F.2d at 1413; *see also Drummond Coal*, 748 F.2d at 1497 (award may be vacated if irrational).

Such is the case here. There is simply no explanation in the award itself why damages were not awarded. The award said that "the Claimant sustained no damages; [a]nd, therefore, we conclude that the Claimant is not entitled to recover" damages. This is a non-sequitur for which there is no basis. The arbitrators did not reflect any disagreement with the district court's statement of the law. Even if there was a dispute as to the application of section 517.12 to the undisputed facts of this case, there is none now, since the Florida Supreme Court certification. We have to assume that the arbitrators' decision was arbitrary or capricious for two reasons: first, it was a reasonable interpretation of the statute made by the district court in questioning the vagueness of the panel's first decision; and second, the district court told them what the law was, and their second award does not indicate that they differ with the point nor does it give any reason for not awarding mandatory damages. Since they knew the law required damages, their refusal to grant damages is clearly arbitrary. There was no reasonable basis upon which the panel may have acted. *See Schmidt v. Finberg*, 942 F.2d 1571, 1577-78 (11th Cir. 1991). In this case, it is not a question of deciding the law and getting it wrong or for some reason disregarding the law. The decision was simply an apparent arbitrary

and capricious denial of relief with no factual or legal basis.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 87-6464-CIV-PAINE

IN THE MATTER OF ARBITRATION BETWEEN:

AL AINSWORTH,

Petitioner,

and

SAM SKURNICK,

Respondent.

June 19, 1989

ORDER VACATING ARBITRATION AWARD AND ENTERING JUDGMENT FOR PETITIONER

This cause comes before the Court upon Petitioner Al Ainsworth's Renewed Petition to Vacate Arbitration Award (DE 23).

Ainsworth's original claim was submitted to arbitration before a panel of the National Association of Securities Dealers, Inc., ("NASD"). Ainsworth asserted claims against Skurnick alleging violations of Fla.Stat. § 517.12, Fla.Stat. § 517.301, and common law breach of fiduciary duties, fraud, deceit and negligence. The matter was submitted to arbitration and an evidentiary and testimonial hearing was held on April 20, 1987. The arbitral panel's award stated in pertinent part: ". . . And, that having heard and considered the proofs of the Parties, have decided and determined that in full and final settle-

ment of the above-referenced matter, that they find for the Claimant but that he sustained no damages . . ."

Ainsworth moved this Court to vacate the arbitration award on grounds of evident partiality and manifest disregard of the law. Florida Statutes, Chapter 517 contains a built-in provision for damages, but despite a finding for Ainsworth, no damages were awarded. This Court's Order of Remand (DE 21) stated:

> The arbitration award rendered by the arbitration panel does not specifically state that Respondent violated Fla.Stat. § 517.12, a statutory provision which triggers the application of the mandatory damages provision. Fla.Stat. § 517.211. The award is vague and cursory. It fails to adequately explain how the conclusion was reached. This Court is disturbed by the arbitration panel's conduct. As a matter of fairness, the parties are entitled to know the specifics of the decision and the rationale. In essence, the vagueness invites speculation and emasculates effective judicial review.
>
> As it stands, the Court's role in review of arbitration awards is limited. It is not the function of the Court to review the merits or construe the meaning of the award. *American Federation of State, County and Municipal Employees, Local Lodge No. 1803 v. Walker County Medical Center*, 715 F.2d 1517, 1519 (11th Cir.1983). In that case there was a question as to the meaning of the term "suitable position" in an employment dispute arbitration award. The Appellate Court, Eleventh Circuit, remanded the case with further instructions to the original arbitrator for clarification since the term was capable of two very different interpretations.
>
> Similarly, since the arbitration award below (#86-1021) is capable of two very different interpretations, the proper course under these circum-

> stances is to allow the arbitrators to resolve the ambiguity. If a statutory violation is found, damages should be awarded. However, if the liability was for a common law violation, rather than a statutory violation, then an award of damages is not mandatory. Without engaging in speculation, it is impossible for this Court to properly assess whether the arbitrators imposed statutory liability on Sam Skurnick. Until such a clarification is made, Petitioner cannot begin to prove nor can this Court determine whether the arbitration panel was evidently partial or acting in manifest disregard of the law in not awarding Al Ainsworth damages.

(DE 21 at 2-3). The arbitration panel was instructed to clarify which of the five counts Sam Skurnick had violated.

On or about March 4, 1988 the arbitrator reconvened for deliberations on the issues raised by this Court's Order of Remand. On April 8, 1988 the Arbitrators issued their new award which states in pertinent part:

> And, having now considered all evidence respecting each and every claim submitted for arbitral determination in connection with the Respondent's position as the Claimant's broker/dealer, we find that the Respondent was negligent in the handling of the Claimant's account, however, the Claimant sustained no damages;
>
> And, therefore, we conclude that the Claimant is not entitled to recover any compensatory damages, nor any punitive damages and interest; . . .
>
> And, further it is our conclusion that the Claimant has not established his right to recover on any of the other claims filed in this proceeding.

Thus, pursuant to this Court's order, the arbitration panel clarified its earlier ruling by explaining that: 1)

it had found Sam Skurnick negligent; 2) Al Ainsworth sustained no damages on account of Skurnick's negligence; and 3) Ainsworth failed to prove any of his other claims, including a violation of Fla.Stat. § 517.12.

This Court finds that there exists no viable reason to vacate the arbitration panel's award as it relates to the finding of negligence or damages attributable to Skurnick's negligence. Additionally, the panel's determination that Ainsworth did not establish his right to recover on his claims of breach of fiduciary duties, fraud, deceit, and violation of Fla.Stat. § 517.301 was justified by the law and the facts. Indeed, Ainsworth does not truly contest this point. Instead, Ainsworth focuses on the arbiters' award as it relates to the remaining statutory cause of action, violation of Fla.Stat. § 517.12. Accordingly, this Court's review of the arbitration panel's finding will focus on whether, in finding that Al Ainsworth did not prove that Skurnick violated § 517.12, the arbiters exhibited "evident partiality" or "manifest disregard of the law."

Florida Statute § 517.12 provides in relevant part:

> *Registration of dealers, associated persons and investment advisors*
>
> (1) No dealer, associated person, or issuer of securities shall sell or offer for sale any securities in or from offices in this state, or sell securities in this state to persons thereof from offices outside this state, by mail or otherwise, unless the person has been registered with the department pursuant to the provisions of this section.

The intent of the statute is to protect investors. *Rudd v. State*, 386 So.2d 1216 (Fla. 5th DCA 1980). Florida Statute § 517.211 provides that "Every sale made in violation of either Section 517.07 or Section 517.12 may be rescinded at the election of the purchasers;" F.S. § 517.211. Thus, if a defendant is found to have violated

Section 517.12, damages are automatic pursuant to Section 517.211.

To prevail on his cause of action under Section 517.12, Ainsworth must prove that at the times relevant hereto:

1) Skurnick was a dealer of securities, who

2) sold securities,

3) in Florida from offices outside Florida, by mail or otherwise, and that

4) Sam Skurnick was not at the time of the sale registered with the Department of Banking and Finance pursuant to the provisions of Section 517.12.

The only one of these elements to which Skurnick readily admits is that he was never registered with the Florida Department of Banking and Finance. (See Arbitration Transcript p. 13-14).

The evidence from the arbitration hearing makes it clear that Skurnick was a dealer of securities. Skurnick defends that he acted merely as a broker, not a dealer. However, Florida Statutes Section 517.021(7) provides: "'broker' means 'dealer' as herein defined." Section 517.021(9) defines a dealer as:

> 1. Any person, other than an associated person registered under this chapter, who engages either for all or part of his time, directly or indirectly, as broker or principal in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

The above definition of dealer precisely describes the role Skurnick played for Ainsworth. Ainsworth opened an account with Skurnick and Skurnick traded securities for Ainsworth. At arbitration Skurnick stated that he was in the business of brokering stocks listed on the New York Stock Exchange. (Arb. Transcript p. 11). Skurnick admitted that Al Ainsworth had an account with

Skurnick (Arb. Transcript p. 24); that Ainsworth signed a standard customer's agreement and a joint account agreement, (Arb. Transcript p. 27); and that Ainsworth signed over to Skurnick discretionary account authority, (*Id.*). Exhibits before the arbitration panel include numerous client confirmation documents. These documents identify themselves as coming from the offices of Sam Skurnick, a member of the New York Stock Exchange; they show the client to be Al Ainsworth at a Florida address; and each confirmation tells the stock bought or sold, the number of shares, the trade date, the total amount paid, the commission paid, etc. Each confirmation also states: "Payment for securities purchased and delivery of securities sold must be received by Sam Skurnick on or before the due date (as noted above) as prescribed by the regulations of the New York Stock Exchange, Inc." Checks were to be made payable to Prudential-Bache Securities. Other exhibits, such as the Securities Account Statements show Sam Skurnick to be Ainsworth's account executive and give a summary of stocks traded. Skurnick described his relationship with Ainsworth as follows: "I served as an introducing broker and I opened up the account for Mr. Ainsworth, I furnished the clearing firm the document which they required and his name and address. And they were responsible for the safety of the securities and money and sending him confirmations and monthly statements. And basically I was responsible for the handling of the account." (Arb. Transcript p. 33). Skurnick stated that he traded stocks for Ainsworth. (Arb. Transcript p. 51). Moreover, in their award, the arbiters refer to Skurnick as Ainsworth's "broker/dealer," clearly implying a finding that Skurnick was Ainsworth's broker/dealer. Under Florida law, one who trades stocks for another is acting as a dealer. The evidence produced at the arbitration hearing makes it abundantly clear (indeed, no other reasonable interpretation is possible) that Skurnick acted as a securities dealer for Ainsworth.

To prevail under Section 517.12, Ainsworth also has the burden of proving that, in Skurnick's role as dealer, Skurnick sold securities in Florida, to Ainsworth. Clearly, Skurnick sold securities to Ainsworth within the meaning of Fla.Stat. § 517.12 and § 517.021(20) (defining "sell"). Skurnick testified that he sold stocks for and to Ainsworth. (*See e.g.* Arb. Transcript p. 50-51).

In *Lewis v. Walston & Co., Inc.*, 487 F.2d 617 (5th Cir. 1973) the old Fifth Circuit addressed the issue of who is a seller under Section 12(1) of the Securities Act of 1933. Section 12(1) imposes liability for the sale of unregulated securities. The court held that

> . . . parties who participate in the negotiations of or arrangements for the sale of unregistered securities "sell" those securities within the meaning of § 12(1). Brokers have long been held liable as sellers under § 12(2), as have other parties responsible for bringing about sales of securities they themselves do not own.

Id. at 621 (citations omitted). The Fifth Circuit explained that the test for whether a participant in the arrangements for a sale "sells" securities is "whether the party is a 'proximate cause' of the sale." *Id.* at 622. The finding of proximate cause turns on whether the party's actions were a "substantial factor" in bringing about the purchases. *Id.* The above test represents a sensible approach for determining whether Skurnick "sold" securities to Ainsworth. Under the above test, Skurnick was clearly a seller of securities to and for Ainsworth. During most of their business relationship, Skurnick had discretionary-authority over Ainsworth's account; the decision whether to buy or sell securities was Skurnick's.

The only issue which remains is whether the subject sales were made in Florida. Skurnick maintains that because he did all his business in his offices in New York

and Connecticut, through brokerage houses also outside of Florida, that he never sold securities in Florida. Unless Skurnick actually sold securities in Florida within the meaning of Fla.Stat. § 517.12, no liability may be found pursuant to that section. This Court has found no cases directly under § 517.12 which explain what it means to sell a security in Florida. However, cases interpreting Florida's long-arm statute help in this regard. Fla.Stat. Section 48.193(1)(a) provides that any person ". . . carrying on a business or business venture in this state . . ." is subject to jurisdiction of the courts of Florida. The Supreme Court of Florida in *Dinsmore v. Martin Blumenthal Assoc. Inc.*, 314 So.2d 561 (Fla. 1975) discussed what it means to engage in a business venture in Florida: "The activities of the person sought . . . must be considered collectively and show a general course of business activity in the State for pecuniary benefit." 314 So.2d at 564. Under this test, Skurnick is clearly subject to the jurisdiction of Florida courts and the registration requirements of Florida apply to him, despite his protestations to the contrary. Moreover, common sense indicates, that one who sells securities by mail to a person who is in Florida is selling securities in Florida.

Accordingly, the only reasonable conclusion to be drawn from the facts adduced at the arbitration hearing is that Sam Skurnick violated Fla.Stat. Section 517.12. Because the arbiters found otherwise, this Court will vacate its ruling as being in manifest disregard of the law. *See Sheet Metal Workers International v. Kinney Air Conditioning Co.*, 756 F.2d 742 (9th Cir.1985).

As stated earlier Fla.Stat. § 517.211 provides that every sale made in violation of Section 517.12 may be rescinded at the election of the purchaser. At arbitration Ainsworth introduced expert testimony that his damages under Fla.Stat. Section 517.12 were fifty-four thousand one hundred eight dollars and seventy-eight cents

($54,108.78), with interest from April 20, 1987. This testimony was not contradicted by Skurnick. Accordingly, it is hereby

ORDERED and ADJUDGED that Petitioner Al Ainsworth's Renewed Petition to Vacate Arbitration Award (DE 23) is GRANTED. It is further

ORDERED and ADJUDGED that Judgment is entered for Al Ainsworth against Sam Skurnick on Ainsworth's claim for Skurnick's violation of Florida Statutes Section 517.12, in the amount of fifty-four thousand one hundred eight dollars and seventy-eight cents ($54,108.78), with interest from April 20, 1987, pursuant to Florida Statutes Section 517.211. It is further

ORDERED and ADJUDGED that Petitioner Al Ainsworth's Motion for Default (DE 27) is DENIED as moot. It is further

ORDERED and ADJUDGED that Respondent Sam Skurnick's Motion to Strike Renewed Petition to Vacate is DENIED. It is further

ORDERED and ADJUDGED that the Clerk of the Court is instructed to close the file.

DONE and ORDERED.

/s/ James C. Paine
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 89-5701

AL AINSWORTH,
Plaintiff-Appellee,

v.

SAM SKURNICK,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

Aug. 17, 1990

Before KRAVITCH, Circuit Judge, RONEY* and ALDISERT**, Senior Circuit Judges.

PER CURIAM:

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF FLORIDA PURSUANT TO ARTICLE 5, SECTION 3(b)(6) OF THE FLORIDA CONSTITUTION.

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* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Ruggero J. Aldisert, Senior U.S. Circuit Judge for the Third Circuit, sitting by designation.

TO THE SUPREME COURT OF FLORIDA AND THE HONORABLE JUSTICES THEREOF:

It appears to the United States Court of Appeals for the Eleventh Circuit that this case involves an important question of Florida law which is determinative of the outcome of the cause, for which there is no clear precedent in the decisions of the courts of Florida. The question involves an interpretation of Fla.Stat. § 517.12, specifically the determination of when a sale of securities is considered to have been made in Florida so as to trigger the application of the automatic damage provisions of Fla.Stat. § 517.211.

I. *Style of the Case*

The style of the case in which this certification is made is Al Ainsworth, plaintiff-appellee, versus Sam Skurnick, defendant-appellant, Case No. 89-5701, United States Court of Appeals for the Eleventh Circuit, on appeal from the United States District Court for the Southern District of Florida.

II. *Nature of Appeal*

This is an appeal from a district court order granting a petition to vacate an arbitration award of the National Association of Securities Dealers and entering judgment for $54,108.78 against the defendant securities broker for violating section 517.12, Florida Statutes (1989), which requires a broker selling securities to be registered in Florida.

The district court's Order Vacating Arbitration Award and Entering Judgment for Petitioner, from which this appeal was taken, is reproduced as Appendix B above.

III. *Statement of the Facts*

Following is a brief statement of the facts, as may be more fully amplified by the district court's order, the briefs and the record on appeal.

Plaintiff Al Ainsworth is a Florida resident. After reading a 1976 article related to defendant Sam Skurnick's success with small market speculators, Ainsworth solicited Skurnick's services by mail. Mailing funds to New York where Skurnick is a registered broker, Ainsworth made a net investment of $1,100 which approximated $12,000 in 1985 when Ainsworth chose to terminate Skurnick's discretionary authority over the securities account.

Ainsworth claimed damages against Skurnick, asserting *first:* that Skurnick sold securities to him by mail without complying with the registration requirements of Florida's securities statutes, and *second:* that Skurnick committed common law breach of fiudciary duty, fraud, deceit, and negligence in the management of Ainsworth's securities account.

Ainsworth's claim against Skurnick went before a National Association of Securities Dealers, Inc. (NASD) arbitration panel which found for the claimant, but assessed no damages. Finding the arbitrators' order vague and cursory, the district court vacated and remanded for interpretation. When an arbitration award can be interpreted in a variety of ways, it is normal to remand for clarification. *San Antonio Newspaper Guild Local 25 v. San Antonio Light Div.*, 481 F.2d 821, 824-25 (5th Cir. 1973).

The arbitrators explained that although Skurnick was found negligent, the claimant sustained no damages and proof of statutory violations were not established. On review, the district court affirmed the decision of the arbitrator, insofar as it denied damages on the common law negligence claims, but found a statutory violation in Skurnick's failure to register in Florida. The district court held that mandatory damages were required, stating that one who sells securities by mail to a person located in Florida is selling securities in Florida and

must be registered in accord with Fla.Stat. § 517.12.[1] A violation of § 517.12 automatically triggers damages under Fla.Stat. § 517.211,[2] which gives the purchaser the option of voiding the sale and instituting an action for rescission if he still owns the security, or permits an action for damages if the security has been sold. After Ainsworth produced evidence of $54,108.78 in damages, judgment was entered against Skurnick in that amount. There appears to be no doubt that Skurnick acted as a securities dealer for Ainsworth within the meaning of Fla.Stat. § 517.021(9).[3] It is clear under § 517.12 that one who is not registered may not *sell securities in this*

---

[1] 517.12 Registration of dealers, associated persons, investment advisers, and branch offices.

(1) No dealer, associated person, or issuer of securities shall sell or offer for sale any securities in or from offices in this state, or sell securities in this state to persons of this state from offices outside this state, by mail or otherwise, unless the person has been registered by the department pursuant to the provision of this section.

[2] 517.211. Remedies available in cases of unlawful sale

(1) Every sale made in violation of . . . s. 517.12 may be rescinded at the election of the purchaser; and the person making the sale and every director, officer, partner, or agent of or for the seller, if the director, officer, partner, or agent of or for the seller, if the director, officer, partner, or agent has personally participated or aided in making the sale, is jointly and severally liable to the purchaser in an action for rescission, if the purchaser still owns the security, or for damages, if the purchaser has sold the security . . .

[3] 517.021. Definitions

When used in this chapter, unless the context otherwise indicates, the following terms have the following respective meanings:

9(a) "Dealer" includes any of the following:

1. Any person, other than an associated person registered under this chapter, who engages, either for all or part of his time, directly or indirectly, as broker or principal in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

state to persons of this state from offices outside this state, by mail or otherwise,[4] but unless the sale is deemed to take place within the state, there can be no statutory liability.

IV. *Reasons for Certification*

The district court had no difficulty with the issues in this case, nor do we, until confronting the issue of whether the subject sales were made in Florida. As to this the district court said:

> Unless Skurnick actually sold securities in Florida within the meaning of Fla.Stat. § 517.12, no liability may be found pursuant to that section. This Court has found no cases directly under § 517.12 which explain what it means to sell a security in Florida.

The briefs of the parties and our own independent research have failed to disclose any cases which would control this issue of Florida law. The district court approached the question by analogy to Florida's long-arm statute. * * * There is no guidance under the decided cases in Florida, however, as to how the Florida courts would deal with this issue. Since the decision has the potential of effecting cases beyond the boundaries of the present controversy, it seems appropriate to have the Supreme Court of Florida make the determination as to whether, under the facts of this case, securities were sold in Florida so that the seller would be required to register under Florida law.

V. *Question to be Certified*

Whether, under the undisputed facts of this case, the transactions between the parties constituted a sale of securities in Florida within the meaning of Fla.Stat. Sec. 517.12.

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[4] *State v. Houghtaling*, 181 So.2d 636 (Fla.1965).

Our statement of the question is not designed to limit the Supreme Court of Florida in its consideration of the problems posed by this entire case. In order to assist consideration of the case, the entire record, along with the briefs of the parties, shall be transmitted to the Supreme Court of Florida.

QUESTION CERTIFIED.

APPENDIX D

SUPREME COURT OF FLORIDA

No. 76,520

SAM SKURNICK,
Defendant/Appellant,

vs.

AL AINSWORTH,
Plaintiff/Appellee.

[September 12, 1991]

OVERTON, J.

The United States Court of Appeals for the Eleventh Circuit, in *Ainsworth v. Skurnick*, 909 F.2d 456 (11th Cir. 1990), certified the following question:

> Whether, under the undisputed facts of this case, the transactions between the parties constituted a sale of securities in Florida within the meaning of Fla. Stat. § 517.12.

* * * *

For the reasons expressed, we answer the question in the affirmative and return this cause to the United States Court of Appeals for the Eleventh Circuit for disposition.

It is so ordered.

SHAW, C.J. and BARKETT, GRIMES, KOGAN and HARDING, JJ., concur. McDONALD, J., dissents.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5701

AL AINSWORTH,
Plaintiff-Appellee,

versus

SAM SKURNICK,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

[Filed July 14, 1992]

ORDER:

Appellant's motion for extension of time to file a petition for rehearing is GRANTED to and including 14 days from the date of this order.

/s/ Phyllis A. Kravitch
United States Circuit Judge

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5701

AL AINSWORTH,
Plaintiff-Appellee,
versus

SAM SKURNICK,
Defendant-Appellant,

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING

[Filed August 4, 1992]

BEFORE: KRAVITCH, Circuit Judge, RONEY * and ALDISERT **, Senior Circuit Judges.

PER CURIAM:

The petition for rehearing filed by appellant is denied.

ENTERED FOR THE COURT.

/s/ Phyllis Kravitch
United States Circuit Judge

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* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Ruggero J. Aldisert, Senior U.S. Circuit Judge for the Third Circuit, sitting by designation.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5701

AL AINSWORTH,
Plaintiff-Appellee,
versus

SAM SKURNICK,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

[Filed September 30, 1992]

ORDER:

Appellant's suggestion of rehearing in banc, construed as a motion for leave to file suggestion for rehearing out of time is denied.

/s/ Phyllis Kravitch
United States Circuit Judge

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH

No. 89-5701

AL AINSWORTH,
Plaintiff-Appellee,

versus

SAM SKURNICK,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
[Filed October 27, 1989]

ORDER:

Pro se appellant's motion to supplement the record on appeal is DENIED as follows: The original petition is DENIED AS MOOT as it is included in the record as document No. 1; the answer to the original exhibit is DENIED as it was included in the record as document No. 4; the transcript is DENIED as it is attached as an exhibit to document No. 19; the arbitrator's exhibit No. 1 is DENIED as it does not appear that this was before the district court.

/s/ Frank M. Johnson Jr.
United States Circuit Judge

APPENDIX I

NATIONAL ASSOCIATION OF
SECURITIES DEALERS, INC.

AWARD

86-1021

IN THE MATTER OF THE ARBITRATION BETWEEN
AL AINSWORTH,

Claimant

VS.

SAM SKURNICK,

Respondent

We, the undersigned, being the arbitrators selected to hear and determine a matter in controversy between the above Claimant and Respondent, set forth in a submission to arbitration signed by the Claimant on August 14, 1986 and by the Respondent on October 31, 1986, respectively;

And, having heard and considered the submissions and proof of the parties, we rendered an Award dated June 2, 1987, which Award was subsequently vacated and remanded to us by order of the United States District Court, Southern District of Florida (the "Court"), for clarification of the Award;

And, pursuant to the aforesaid Court Order we reconvened for a deliberation on the issues raised by the Court on March 4, 1988, in Ft. Lauderdale, Florida;

And, having now considered all evidence respecting each and every claim submitted for arbitral determination in connection with the Respondent's position as the

Claimant's broker/dealer, we find that the Respondent was negligent in the handling of the Claimant's account, however, the Claimant sustained no damages;

And, therefore, we conclude that the Claimant is not entitled to recover any compensatory damages, nor any punitive damages and interest;

And, that the counterclaim of the Respondent shall be and hereby is denied in all respect;

And, that each party shall bear its own costs and expenses including attorneys fees;

And, further it is our conclusion that the Claimant has not established his right to recover on any of the other claims filed in this proceeding.

/s/ Henry J. Stella
HENRY J. STELLA, ESQ.

/s/ Samson Silberman
SAMSON SILBERMAN

/s/ Peter J. Lavezzoli
PETER J. LAVEZZOLI

Dated: 4/8/88

APPENDIX J

NATIONAL ASSOCIATION OF
SECURITIES DEALERS

AWARD

86-1021

IN THE MATTER OF THE ARBITRATION BETWEEN
AL AINSWORTH,

Claimant

vs.

SAM SKURNICK,

Respondent

The undersigned, being the arbitrators selected to hear and determine a matter in controversy on April 20, 1987 between the above-mentioned Claimant and Respondent, set forth in a submission to arbitration signed by the Claimant on August 14, 1986 and by Respondent on October 31, 1986, respectively;

And, that having heard and considered the proofs of the Parties, have decided and determined that in full and final settlement of the above-referenced matter, that they find for the Claimant but that he sustained no damages;

And, that the counterclaim of the Respondent shall be and hereby is dismissed;

And, that the Claimant's claims for punitive damages and interest are denied;

And, that each party shall bear its own costs and expenses including attorney's fees;

And, that the $300.00 filing fee previously deposited by the Claimant with the N.A.S.D., Inc. shall be refunded to the Claimant and assessed against the Respondent.

/s/ Henry J. Stella
HENRY J. STELLA, ESQ.

/s/ Samson Silberman
SAMSON SILBERMAN

/s/ Peter J. Lavezzoli
PETER J. LAVEZZOLI

Dated: June 2, 1987

Supreme Court, U.S.
FILED
JAN 19 1993
OFFICE OF THE CLERK

FEB 19 PAGE 19

No. 92-1029

In The

Supreme Court of the United States

October Term, 1992

SAM SKURNICK,

Petitioner,

vs.

AL AINSWORTH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is judicial intervention appropriate to vacate an arbitration award when it is determined that the award was based upon arbitrary and capricious acts of the arbitrators?

2. To the extent that the questions presented by Skurnick merely presents an evidentiary question, they are inappropriate for review on writ of certiorari under the criteria outlined in Rule 10 of the Supreme Court Rules.

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No. 92-1029

In The

Supreme Court of the United States

October Term, 1992

SAM SKURNICK,

Petitioner,

vs.

AL AINSWORTH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This is an appeal which originated from the District Court's June 19, 1989 Order which granted Respondent's Renewed Petition to Vacate Arbitration Award. Previously, the District Court had granted Respondent's Petition to Partially Vacate or Modify Arbitration Award by ordering a remand to the arbitral panel. Petitioner appealed to the Eleventh Circuit Court of Appeals

the portions of the Order that partially vacated (the arbitral award on remand) and that entered judgment on behalf of Respondent for statutory damages computed pursuant to §§ 517.12 and 517.211, Florida Statutes.

Respondent, Al Ainsworth ("Ainsworth"), a Florida resident, at all times relevant, commenced a business relationship with Petitioner, Sam Skurnick ("Skurnick"), by mail in January-March 1976. Throughout their relationship, Skurnick acted as Ainsworth's "stockbroker" from Skurnick's offices in New York City and Stamford, Connecticut. Skurnick admitted that Ainsworth gave him "discretionary control over (Ainsworth's) brokerage account" with Skurnick until January, 1985 when Ainsworth "terminated Skurnick's discretionary authority to manage his account." Skurnick's "clearing firm" for his brokerage activities during his brokerage relationship with Ainsworth was Prudential-Bache Securities, Inc. ("Pru-Bache"), although Skurnick also cleared through Bruns, Nordeman, Rea & Co. While it is true that Ainsworth was, at all times, deaf, the record summary of Skurnick's activities in Florida are:

> 1. The article which Ainsworth read relating to Skurnick's success with small accounts appeared in *Money's Worth*, a New York publication.
>
> 2. Ainsworth wrote to Skurnick in his New York office after reading the magazine article.
>
> 3. In response to Ainsworth's inquiry, Skurnick wrote to Ainsworth in Florida, including an application form and a letter which Ainsworth signed, giving Skurnick authority to open a discretionary margin account and enclosing a check made to Bruns,

Nordeman, Rea & Co.

4. Ainsworth completed the application form in Florida and returned it to Skurnick's New York Office.

5. Monthly statements were sent to Ainsworth in Florida by the firms through which Skurnick dealt, Bruns, Nordeman and Bache. Skurnick's name was prominently displayed on the statements.

6. Ainsworth is deaf and never spoke personally with Skurnick over the telephone. There were occasions when Skurnick spoke with Ainsworth's nephew. It is unclear from the record, however, whether Skurnick placed any of the telephone calls.

7. Skurnick speaks of writing letters to his clients.

8. Skurnick testified that he wrote to Ainsworth in Florida, suggesting that he get off margin.

9. Skurnick sent a rebate form to Skurnick in Florida which Ainsworth returned through the mail.

10. Skurnick wrote letters to his clients telling them to "hold on".

11. Skurnick wrote to Ainsworth in Florida concerning risk-spreading through diversification.

12. Skurnick placed ads in the Wall Street Journal.

13. Over the years of doing business, various correspondence took place between Ainsworth and Skurnick.

14. Ainsworth testified that he made inquiries of Skurnick a few times and received long-hand replies through the mail.

15. Skurnick knew that Ainsworth was a resident of Florida.

16. Skurnick's offices were in New York originally but moved later to Connecticut.

17. In 1976, Skurnick was registered as a broker/dealer in three States, namely, New Jersey, New York and Connecticut. By 1985, Skurnick was registered only in Connecticut.

18. Skurnick chose the clearing broker for Ainsworth.

19. Skurnick's clearing broker at the time that the transactions with Ainsworth commenced in 1976 was Bruns, Nordeman, Rea & Co.

20. Early in the nine-year relationship of Ainsworth and Skurnick, the latter changed clearing brokers and switched to Prudential Bache Securities Inc., as the clearing broker.

21. Skurnick's clearing brokers mailed confirmations of the securities transactions in Ainsworth's account to Ainsworth in Florida during the nine-years in which the securities account existed.

22. Skurnick was identified on the confirmations of securities transactions.

23. There were numerous transactions in Ainsworth's account over the nine-year period.

24. Ratifications occurring because of the receipt of confirmation, statements, etc., occurred in Florida.

25. Skurnick testified he was "engaged in the business as a broker."

26. Skurnick received commissions on all transactions effectuated in Ainsworth's account.

27. When Ainsworth moved within the State of Florida during 1976-85, he notified Skurnick who, then, communicated by mail to the new address.

28. Ainsworth signed two agreements sent to him by Skurnick, a standard customer's agreement and a joint account agreement.

29. Skurnick became registered with the National Association of Securities Dealers, Inc., as a broker/dealer in 1972.

30. Skurnick was registerd with the Securities and Exchange Commission ("S.E.C."), in 1972.

31. Skurnick testified: "I served as an introducing broker".

32. Despite his clearing broker's performing of its clearing functions, Skurnick basically was responsible for the handling of the account.

33. Skurnick had a special form for people like Ainsworth who wrote to Skurnick because of the *Money's Worth* article; and, this form was among the papers mailed to Ainsworth, completed by him, and mailed back to Skurnick.

34. Skurnick or one of his assistants wrote to Ainsworth for instructions.[1]

Skurnick was alleged to be an "introducing dealer" or "introducing broker" within the meaning of Florida's Administrative Code.

On August 14, 1986, Ainsworth filed a five-Count Verified Statement of Claim in Arbitration with the National Association of Securities Dealers, Inc. ("NASD") seeking recovery from Skurnick on two statutory causes of action for violations of Florida's Securities and Investor Protection Act ("SIPA"), *viz.*,

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1. Items 1 through 14 of the Summary of Skurnick's activities in Florida are contained in *Ainsworth v. Skurnick*, 909 F.2d 456 (11th Cir. 1990).

violations of Sections 517.12 and 517.301, Florida Statutes; and, three common law causes of action, *viz.*, breach of fiduciary duties, fraud and deceit, and negligence.

Section 517.12, Fla. Stat., requires registration by securities dealers who, "sell securities in this state from offices outside this state, by mail or otherwise." This express registration requirement for sales of securities in Florida to Florida residents from offices outside of Florida has been a part of SIPA since 1973, Laws of Florida 1973, c. 73-68, § 3 amending § 517.12, Fla. Stat. (1971). A sale of securities in violation of § 517.12, Fla. Stat., is an "unlawful" sale of securities that, "may be rescinded at the election of the purchaser . . . if the purchaser still owns the security, or for damages, if the purchaser has sold the security." A SIPA "dealer" includes "Any person . . . who engages, either for all or part of his time, directly or indirectly, as broker or principal. . . ." § 517.021(9)(a)1, Fla. Stat. a SIPA "broker" means a SIPA "dealer." § 517.021(7), Fla. Stat. In an action for damages pursuant to § 517.211, a purchaser "shall recover an amount equal to the difference between: (a) the consideration paid . . . plus interest; and (b) the value . . . at the time it was disposed . . . plus the amount of any income received." § 517.211(4), Fla. Stat.

Section 517.301, Fla. Stat., prohibits fraudulent securities transactions. For a violation of § 517.301, the purchaser is entitled, "to rescind . . . and recover damages as provided in § 517.211(3)(a), (4), and (6)." § 517.312(2), Fla. Stat.

Following an arbitral hearing on April 20, 1987, the panel of three arbitrators published their Award of June 2, 1987, that provided, among other things: "(T)he arbitrators . . . have decided . . . that they find for the Claimant but that he sustained no damages. . . . And, that the $300.00 filing fee . . . shall be refunded to the Claimant and assessed against the Respondent."

On June 23, 1987, Ainsworth filed a Petition to Partially Vacate or Modify Arbitration Award in the District Court, claiming the arbitrators had been evidently partial because SIPA contained formulae for the mandatory computing of damages for SIPA violations, the arbitrators had no discretion in this regard pursuant to § 517.12, Florida Statutes; and, Ainsworth had produced expert oral and documentary evidence of $54,108.78 of damages as of April 20, 1987 that Skurnick had countered solely by his own opinion testimony that Ainsworth had not been damaged. Subsequently, Ainsworth sought to amend his Petition to Partially Vacate to add the arbitrators' "manifest disregard of the law" as an additional ground for partially vacating the award which amendment was permitted by the District Court Order.[2]

Skurnick opposed the Petition to Partially Vacate and asserted three affirmative defenses: (1) a court cannot vacate an arbitral award for errors of law or fact; (2) an award is conclusive on all issues submitted and no judicial review thereof was authorized; and (3) arbitrators need not state reasons for an award.

On January 8, 1988, a non-jury trial was had on Ainsworth's Petition to Partially Vacate. Skurnick has misstated what transpired concerning the exhibits introduced by Ainsworth during this proceeding.

Prior to the non-jury trial taking place, the parties filed a joint pre-trial stipulation wherein Ainsworth listed as possible exhibits he would introduce "all exhibits introduced in the Arbitration Hearing. . . ." What Skurnick failed to understand was that Ainsworth had no obligation to introduce all exhibits. He only

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2. Contrary to Skurnick's statement on pages 6 and 7 of his Petition, it was Ainsworth who petitioned the court through his counsel. Forkey himself did not participate in the January 8, 1988 non-jury trial held before the District Court. This was handled by other counsel in the firm.

needed to introduce those he thought were material to his case. This he did. Any failure by Skurnick to introduce what he deemed to be appropriate exhibits was his own fault. The District Court did not conspire with Ainsworth to prevent Skurnick from presenting anything he deemed relevant to his case.

Following the non-jury trial, the District Court issued an Order of Remand on January 11, 1988 and ruled:

> Petitioner asserts two grounds for vacation of the arbitration award. . . . The basis of these assertions is that Florida Statutes, Chapter 517 contains a built-in provision for damages. However, the arbitration panel did not award damages. . .
>
> The arbitration award . . . does not specifically state that Respondent violated Fla. Stat. § 517.12, a statutory provision which triggers the application of the mandatory damages provision, Fla. Stat. § 517.211. The award is vague and cursory. It fails to adequately explain how the conclusion was reached. This Court is disturbed by the arbitration panel's conduct. . . In essence, the vagueness invites speculation and emasculates effective judicial review.
>
> * * *
>
> (S)ince the arbitration award below (# 86-1021) is capable of two very different interpretations, the proper course under these circumstances is to allow the arbitrators to resolve the ambiguity. If a statutory violation is

> found, damages should be awarded. . . . Without engaging in speculation, it is impossible for this Court to properly assess whether the arbitrators imposed statutory liability on Sam Skurnick. Until such a clarification is made, Petitioner cannot begin to prove nor can this Court determine whether the arbitration panel was evidently partial or acting in manifest disregard of the law in not awarding Al Ainsworth damages.

Upon remand, the arbitral panel reconvened in private session on March 4, 1988 and issued a new Award that recited in part:

> And, having now considered all evidence respecting each and every claim submitted for arbitral determination in connection with the Respondent's position as the Claimant's *broker/dealer*, we find that the Respondent was negligent in the handling of the Claimant's account, however, the Claimant sustained no damages.
>
> * * *
>
> And, further, it is our conclusion that the Claimant has not established his right to recover on any of the other claims filed in this proceeding. (Emphasis added.)

The new award deleted the refund of a $300.00 filing fee to Ainsworth that had been provided in the original award.

Upon the issuance of the arbitral award after remand from the District Court, Ainsworth filed a Renewed Petition to Vacate

Arbitration Award, supported by a separately filed memorandum of law, claiming evident partiality by the arbitrators because of a failure to take additional evidence; and a manifest disregard of the law, *viz.*, § 517.12, Florida Statutes, because (1) Skurnick had admitted that he had not been registered in Florida; and (2) the arbitrators had failed to award statutory damages because of a § 517.12, Florida Statutes violation; and (3) there was no support in the record for the arbitrators' finding of non-liability under § 517.12.

As part of Ainsworth's Renewed Petition to Vacate, the arbitral hearing transcript was included which contained Skurnick's testimony that he had never been registered in Florida and that he knew that if he did business in Florida he needed to be registered. Included also therein was Ainsworth's Memorandum of Law submitted in the NASD's arbitral proceeding concerning Skurnick's liability under § 517.12.

In Skurnick's Reply to the Renewed Petition to Vacate and supporting memorandum, Skurnick contended that the bases for the arbitrators' findings existed in the Award's language that the arbitrators had, "considered all evidence respecting each and every claim,"; that he was not a "dealer" within the meaning of SIPA even though he had testified to being a broker for stocks listed on the New York Stock Exchange; and, that his clearing brokers who sent monthly statements and transaction confirmations from outside of Florida to Ainsworth in Florida were registered as dealers in Florida. In his supporting Memorandum of Law in Opposition to the Renewed Petition to Vacate, Skurnick incorporated his Answer filed in the arbitral proceeding as an exhibit, and asserted four reasons for denying the Renewed Petition to Vacate: (1) errors of fact or law are not reversible; (2) there was no evidence of a violation of § 517.12; (3) the new award was not subject to judicial review; and (4) the Renewed Petition to Vacate negated the arbitration process.

In Ainsworth's response to Skurnick's filings in opposition to the Renewed Petition to Vacate, Ainsworth argued that Skurnick was a dealer within the meaning of § 517.021(9)(a), Florida Statutes; and, that Skurnick's usage of clearing brokers who were registered did not exempt them from registration as an "introducing broker" because Rule 3E-200.01(18) of Florida's Administrative Code specifically required registration of an "introducing broker" even though he did not perform clearing functions.

Following Skurnick's filing of objections to oral argument on Ainsworth's Renewed Petition to Vacate, the District Court issued its Order Vacating Arbitration Award and Entering Judgment for Ainsworth for statutory damages pursuant to §§ 517.12 and 517.211 in the amount of $54,108.78 with interest from April 20, 1987. The District Court expressly did not vacate either because of the panel's finding of negligence without damages or because the panel did not find violations of Ainsworth's claims of breach of fiduciary duties, fraud and deceit, or violation of § 517.301. Rather, the District Court reviewed the panel's finding that Skurnick was not proven to have violated § 517.12 for either evident partiality or manifest disregard of the law by the arbitrators and vacated because this finding was in contradiction to, "the only reasonable conclusion to be drawn from the facts," and, therefore, in manifest disregard of the law. The District Court's reasoning for its holding was that Skurnick had admitted non-registration; that the evidence established that Skurnick was a dealer within the meaning of § 517.021(9) and no other reasonable interpretation of the evidence thereon was possible; that Skurnick had made "sales" of securities to Ainsworth within the meaning of § 517.021(20) and § 517.12; and, that Skurnick's sales by mail into Florida required his registration in Florida pursuant to § 517.12. Judgment was entered by the District Court for the amount of statutory damages proved by Ainsworth without contradiction by Skurnick in the arbitration.

In a Motion for Reconsideration of Order Vacating Arbitration Award and Entering Judgment for Ainsworth, Skurnick contended (1) even if § 517.12 had been violated, no damages were required to be awarded; (2) only if the arbitrators had found a statutory violation could the manifest disregard of the law standard be applied; (3) the District Court misapplied the manifest disregard of the law standard and the arbitrators had, "(O)bviously considered the law pursuant to the Court's Order of Remand"; (4) there was no evidence that Skurnick was a "dealer" within the meaning of SIPA; (5) there was no evidence of Skurnick's selling of securities to Ainsworth but only evidence of selling securities for Ainsworth: "I testified that I sold stocks for AINSWORTH. In selling stocks for Ainsworth I admitted acting for him in the capacity of a broker"; and (6) there was no evidence of sales by Skurnick in Florida within the meaning of § 517.12. In his memorandum of law in support of his Motion for Reconsideration, Skurnick contended that a vacation for manifest disregard of the law could not be made because this standard was not expressed in the Federal Arbitration Act, 9 U.S.C. § 10 but quoted and cited numerous cases that recognized the manifest disregard of the law standard.

Skurnick's Motion for Reconsideration was denied.

In his initial brief to the Eleventh Circuit Court of Appeals, Skurnick stated that there were seven issues on appeal. Skurnick's initial brief raised issues on appeal that were not raised in the District Court or in the arbitral hearing: (1) the appealed Order had violated various constitutional rights of Skurnick; (2) primary jurisdiction of the parties' dispute of an arbitral award was in the Florida Department of Banking and Finance and not in theDistrict Court; and (3) Florida law did not apply to the dispute but New York law did because of a choice of law provision to this effect in the Customer's Agreement executed between Ainsworth and Skurnick when the account was opened so that Skurnick could not

have been found to have violated Floridas SIPA by the arbitrators.[3]

As the appellate court noted in *Ainsworth v. Skurnick*, 909 F. 2d 456 (11th Cir. 1990) (*Ainsworth I*) the sole question on appeal involves an interpretation of Fla. Stat. § 517.12, specifically the determination of when a sale of securities is considered to have been made in Florida so as to trigger the application of the automatic damage provisions of Fla. Stat. § 517.211. For as the appellate court stated "the district court had no difficulty with the issues in this case, nor do we, until confronting the issue of whether the subject sales were made in Florida." At 990 F.2d 458.

Consequently, the appellate court certified the following question to the Florida Supreme Court.

> Whether, under the undisputed facts of this case, the transactions between the parties constituted a sale of securities in Florida within the meaning of Fla. Stat. Sec. 517.12.
>
> Our statement of the question is not designed to limit the Supreme Court of Florida in its consideration of the problems posed by this entire case. In order to assist consideration of the case, the entire record, along with the briefs of the parties, shall be transmitted to the Supreme Court of Florida.

QUESTION CERTIFIED

On September 12, 1991, the Florida Supreme Court answered the certified question in the affirmative in *Skurnick v. Ainsworth*,

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3. Skurnick aga[illegible]s issues, in his Petition, that were not raised below. This will be more fully addressed in the following section of this brief.

591 So. 2d 904 (Fla. 1991). This decision was not appealed by Skurnick.

Upon certification, the Eleventh Circuit Court of Appeals requested letter briefs which addressed the effect of:

(a) The Florida Supreme Court's certification order dated September 12, 1991;

(b) The court's decision in *O.R. Securities v. Professional Planning Assoc.*, 857 F.2d 742, 746 (11th Cir. 1988); and,

(c) 9 U.S.C. § 10.

Thereafter, with the original briefs of the parties, the certified question answered by the Florida Supreme Court and the letter briefs of the parties, wherein Ainsworth pointed out to the appellate court that the District Court was right for the wrong reason, the Eleventh Circuit issued its opinion in *Ainsworth v. Skurnick*, 960 F.2d 939 (11th Cir. 1992) (*Ainsworth II*).

In *Ainsworth II*, the court discussed the use of manifest disregard of the law standard to vacate an arbitration award and then went on to state:

> This Circuit, however, has never adopted that standard as a ground for vacating an arbitration award. . . .The cases are unclear as to whether we have ever held that it would be error to vacate an arbitration award as being in manifest disregard of the law.
>
> Our cases do hold, however, that although great difference is normally accorded an

> arbitration award, an award that is arbitrary or capricious is not required to be enforced . . . An award is arbitrary and capricious only if a ground for the arbitrator's decision cannot be inferred from the facts of the case.

The appellate court then went on to state why the award of the arbitrators based upon the specific facts of this case was arbitrary and capricious and affirmed the decision of the District Court.

Skurnick then filed the subject Petition with this Court and again has attempted to raise issues not before the trial court such as his due process argument arising under the Fifth Amendment to the United States Constitution and whether or not the decision of the Eleventh Circuit panel conflicts with the best interests of the government.

REASONS FOR DENYING THE WRIT

Skurnick has set forth a litany of reasons as to why his Petition should be granted and then embarks primarily into a factual re-argument of his case. In essence, Skurnick is asking the Court to review the evidence or inferences drawn from it and determine factually that the District Court erred. This is not a reason for the granting of his Petition. *General Talking Pictures Corporation v. Western Electric Company*, 58 S. Ct. 849 (1938).

Both the decision of the District Court and those of the Eleventh Circuit Court of Appeals reflect the undisputed facts upon which both courts based their decisions of which Skurnick complains. Skurnick refuses to accept the effect of his activities, in Florida, as they relate to Ainsworth. At this point, it is important to note that the facts underlying the Eleventh Circuit's decision in *Ainsworth II* would have been reviewed *de novo*. *Robbins v. Day*, 954 F.2d 679, 681 (11th Cir. 1992).

Further, Skurnick does not have a clear understanding concerning certain of the legal issues involved in holding him liable for a violation of Florida Statute § 517.12. This is reflected in the portion of his Petition labeled "Constitutional and Statutory Provisions Involved" wherein he references the United States Securities Exchange Act of 1934, Section 78c(4) and (5) which defines the term "broker" and "dealer" under that statute and also references the Fifth Amendment to the Constitution of the United States.

In that regard Skurnick's reliance on §§ 78c(4) and (5) is misplaced in that this case deals with a violation of Florida Statute § 517.12 and as the District Court indicated in its Order Vacating Arbitration Award and entering judgment for Petitioner:

> . . . Florida Statutes Section 517.021(7) provides "broker means 'dealer' as herein defined." Section 517.021(9) defines dealer as:
>
> 1. Any person, other than an associated person registered under this chapter, who engages either for all or part of his time, directly or indirectly, as broker or principal in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

The District Court then went on to indicate that this definition of dealer precisely describes the role that Skurnick played for Ainsworth. Therefore, it is apparent that 15 U.S.C. §§ 78c(4) and (5) are not involved in this action.

Skurnick also attempts to assert a Fifth Amendment argument to this Court as he did with the Eleventh Circuit. As Ainsworth pointed out to the Eleventh Circuit, this issue was raised for the

first time on appeal and was not presented to the lower court.

I.

CONFLICT WITH DECISIONS OF THIS COURT

Skurnick contends that the Eleventh Circuit decision in this case conflicts with this Court's decisions in *Bernhardt v. Polygraphic Co. of America*, 76 S. Ct. 273 (1956) and *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 80 S. Ct. 1358 (1960). Ainsworth sees no conflict. The District Court in its original order of remand did not determine that there was "a mere ambiguity in the opinion accompanying an award" but that the award itself was capable of two very different interpretations. It was the award itself that the District Court determined needed to be clarified This the arbitrators did. For as the District Court noted, "it is not the function of the Court to review the merits or *construe* the meaning of the award." (Emphasis added.) Citing *American Federation of State, County and Municipal Employees, Local Lodge No, 1803 v. Walker County Medical Center*, 715 F.2d 1517, 1519 (11th Cir. 1983). It was based upon this second or amended award of April 4, 1988 that the District Court entered its order of June 19, 1989.

II.

CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL

In attempting to show a conflict with decisions of other courts of appeal, Skurnick is reaching for straws that do not exist.

The first case that Skurnick relies upon to demonstrate a conflict between different Circuit Courts of Appeals is *Marshall v. Green Giant & Co.*, 942 F.2d 539, 544 (8th Cir. 1991). Again

Ainsworth sees no conflict between the holding in that case and the matter presently before this Court.

In *Marshall*, the court was called upon to determine whether or not the registration provisions of the Commodity Exchange Act provided a private cause of action for the farmers who sued Green Giant in that case. The court held that it did not.

It is apparent that this case is distinguishable from the case at bar. For as the Florida Supreme Court noted in *Skurnick v. Ainsworth*, 591 So. 2d 904, 906 (Fla. 1991):

> The intent of § 517.12 is to protect purchasers and, if that section has been violated, damages are automatic in accordance with the provisions of § 517.211.

As to the quotations reflected in Skurnick's petition, allegedly arising from the *Marshall* decision as referenced on page number 24 thereof, Ainsworth was unable to locate the first quotation anywhere in that decision. The closest that Ainsworth could come to that quotation, referenced by Skurnick, is on page 544 thereof where it is stated, under the procedural history of that case, that:

> The district court agreed with Green Giant and, in January 1988 confirmed the award and referred the collateral estoppel question to arbitration.

The second quotation set forth by Skurnick shows up on a page 546, of the *Marshall* decision, and is taken out of context and specifically does not hold, as Skurnick indicated on page 25 of his Petition, that "failure to register with proper authorities does not in itself, entitle the Plaintiff to collect damages" he did not actually suffer.

Skurnick then contends that the court's decision in *Ainsworth II* conflicts with two Second Circuit cases, *i.e., Amicizia Societa Navegozione v. Chilean & Ionine Sales Corp.*, 274 F.2d 805 (2nd Cir. 1960) and *Diapulse Corp. of America v. Carba Limited Ltd.*, 626 F.2d 1108 (2nd Cir. 1980).

Again, Skurnick misses the mark concerning his analyzation of those cases. For example, the quotation, from the *Amicizia* decision referenced on page 25 of his petition, is correct. However, the next sentence following that quotation states as follows:

> It is true that an award may be vacated where the arbitrators have exceeded their powers. 9 U.S.C. § 10d. Apparently relying upon this phrase, the Supreme Court in *Wilco v. Swan*, 74 S. Ct. 182 (1953) suggested that an award may be vacated if in manifest disregard of the law.

This issue itself was never reached in the *Amicizia* case because of the fact that the only issue before the court was whether the arbitrators misconstrued a contract and the court determined that whether the contract was correctly construed or not was not opened to judicial review.

As a matter of fact, in *Carte Blanche (Singapore) v. Carte Blanche (Int.)*, 888 F.2d 260 (2nd Cir. 1989), the Second Circuit specifically acknowledged that in addition to the grounds set forth in 9 U.S.C. §§ 10 and 11, a judicially created manifest disregard law standard has been determined to exist as a grounds for review of arbitration awards.

As argued to the Eleventh Circuit Court of Appeals by Ainsworth, this case was factually unique because the arbitrators were given specific instructions by the District Court as to the applicable law and the requirement to award damages but they

chose not to do so. As the *Ainsworth II* court put it:

> There was no reasonable basis upon which the panel may have acted . . . *In this case, it is not a question of deciding the law and getting it wrong or for some reason disregarding the law. The decision was simply an apparent arbitrary and capricious denial of relief with no factual or legal basis.*

(Emphasis added.)

In *Barbier v. Shearson Lehman Hutton Inc.*, 948 F.2d 117 (2nd Cir. 1991), the Second Circuit also acknowledged that by implication that if a ground for the arbitrators' decision cannot be inferred from the facts of the case, the award should be vacated.

Between the issuance of its opinion in *Ainsworth I* and *Ainsworth II*, the Eleventh Circuit issued its opinion in *Robbins v. Day*, 954 F.2d 679 (11th Cir. 1992), wherein the court stated:

> . . . The Federal Arbitration Act presumes that reviewing courts will confirm arbitration awards and that the court's review of arbitration process will be severely limited.
>
> * * *
>
> . . ., when a district court goes against the presumption that it should affirm an arbitration award, we must review de novo to protect the integrity of the arbitration process.
>
> * * *
>
> The statute does not allow an arbitration

> award to be vacated solely on the basis of error of law or interpretation but requires something more, such as misconduct pertaining to the proceedings on the part of the arbitration or the parties.
>
> * * *
>
> Following Eleventh Circuit precedent, we decline to adopt the manifest disregard of the law standards.

What the court did in *Robbins* was re-enforced in *Ainsworth II* when it stated:

> Courts are generally prohibited from vacating an arbitration award on the basis of errors of law or interpretation, and the express terms of 9 U.S.C. §§ 10 and 11 have often been deemed the exclusive grounds for vacation or modification. Several courts have discussed the use of a "manifest disregard of the law" standard to vacate an arbitration award. This Circuit, however, has never adopted that standard as a ground for vacating an arbitration award. The cases are unclear as to whether we have ever held that it would be error to vacate an arbitration award as being in manifest disregard of the law.
>
> Our cases do hold, however, that although great deference is normally accorded an arbitration award, an award that is arbitrary or capricious is not required to be enforced. An award is arbitrary and capricious only if "a

ground for the arbitrator's decision cannot be inferred from the facts of the case."

Such is the case here. There is simply no explanation in the award itself why damages were not awarded. The award said that "the Claimant sustained no damages; [a]nd, therefore, we conclude that the Claimant is not entitled to recover" damages. This is a non-sequitur for which there is no basis. The arbitrators did not reflect any disagreement with the district court's statement of the law. Even if there was a dispute as to the application of section 517.12 to the undisputed facts of this case, there is none now, since the Florida Supreme Court certification. We have to assume that the arbitrators' decision was arbitrary or capricious for two reasons; first, it was a reasonable interpretation of the statute made by the district court in questioning the vagueness of the panel's first decision; and their second award does not indicate that they differ with the point nor does it give any reason for not awarding mandatory damages. Since they knew the law required damages, their refusal to grant damages is clearly arbitrary. There was no reasonable basis upon which the panel may have acted. In this case, it is not a question of deciding the law and getting it wrong or for some reason disregarding the law. The decision was simply an apparent arbitrary and capricious denial of relief with no factual or legal basis (citations omitted).

Based upon the above, it is apparent that the requirements to

vacate an arbitration award in the Eleventh Circuit are more stringent then in those Circuits that have adopted the manifest disregard of the law standard. However, in those unique factual situations such as those that exist in this case, judicial review is necessary to prevent arbitrators from not only disregarding the law but also the uncontrived facts of the case. Simply put, arbitrators cannot be allowed to act in an arbitrary and capricious manner.

III.

ISSUES RAISED BUT NOT ARGUED

Skurnick feels that even after three separate courts have heard and considered the issues in this case, he has somehow been deprived of property without due process of law. This is a non-sequitur. Not only has he not presented any facts in support of this contention, he has presented no legal argument in support thereof.

CONCLUSION

Based upon all of the foregoing authorities and argument, the Skurnick Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JEFFREY WINIKOFF
Counsel of Record
RUSSELL L. FORKEY, P.A.
Attorneys for Respondent

Supreme Court, U.S.
FILED
FEB 5 1993
OFFICE OF THE CLERK

No. 92-1029

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SAM SKURNICK,

Petitioner,

v.

AL AINSWORTH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

So that the facts of this case may be fairly and accurately recorded for the record, I take exception to the following statements and arguments in the Respondent's Brief in Opposition (Br. in Opp.).

The Respondent's first sentence is a half-truth in that he represents that the reason for my appeal from the district court's order was merely because it vacated the Arbitration award. The district court also issued a judgment against me that modified the arbitration award on none of the grounds specified in 9 U.S.C. § 11, and which did not conform to the intent of the arbitrators.

The last sentence in his second paragraph says: "While it is true that Ainsworth was, at all times, *deaf*, the record summary of Skurnick's activities *in Florida* are." (Emphasis is mine at all times.)

Here Respondent's attorney (Forkey) admits that Ainsworth was "*at all times, deaf.*" The question therefore arises why he prepared a verified complaint for Ainsworth to sign which stated: "Prior to January, 1984, the Claimant *through conversation* advised the Respondent of the following facts:" He then proceeded to list five fraudulent representations that he alleged Ainsworth made to me, and five misrepresentations that I made to Ainsworth in these alleged conversations that never took place.

Here, and in another case of which I have direct knowledge, is revealed Forkey's practice to prepare fictitious representations in *verified* complaints for which he obtained his clients' signatures. He apparently worked on the theory since these fictitious representations were made in *conversations*, if they were questioned, it would be a case of his client's word against that of the Respondent's. In this particular case he was unaware of the fact that Ainsworth was deaf when he prepared the fictitious complaint for Ainsworth's signature.

I object to the numbered items 1-34 (Br. in Opp. pp. 2-6) as being described as "Skurnick's activities *in* Florida."

Item 26 states: "*Skurnick received commissions on all transactions effectivated in Ainsworth's account.*" This confirms my claim that I acted in the capacity of a "broker" for all transactions on behalf of Ainsworth, and none in the capacity of a dealer who buys or sells stocks as a principal without commission charges.

On page 7 Forkey says that Florida § 517.02(9)(a)1 states that "broker" means "dealer". This would indicate that in Florida a "broker" is a "dealer" despite the fact that the U.S. Securities Exchange Act of 1934 differentiates between a "broker" and a "dealer," and this differentiation is used and recognized throughout the securities industry.

However, § 517.021(9)(b)5 of the Florida Statutes of 1985, which was in effect during my association with Ainsworth, states: "The term 'dealer' does *not* include the following: Any person buying and selling exclusively through a registered dealer or stock exchange:" Since all stocks purchased and sold by me for Ainsworth's account were executed on The New York Stock Exchange, I was not a dealer according to 1985 Florida statutes.

Subsequent to 1985 the provisions of Florida Statute § 517.021(9)(b)5 was changed and this "*ex post facto*" law was the basis for the Eleventh Circuit Panel stating in its certification request, "there appears to be no doubt that Skurnick acted as a securities dealer for Ainsworth within the meaning of Fla. Stat. § 517.021(9). Florida statute § 517.021 (9)(b)5 in effect at the time, creates at the very least a *doubt* that according to Florida law I acted as a "dealer" in securities.

Br. In Opp. p. 8 states: "Skurnick has misstated what transpired concerning the exhibits introduced by Ainsworth during this proceeding. Prior to the non-jury trial taking place, the parties filed a joint pre-trial stipulation wherein Ainsworth listed *as possible exhibits* he would introduce '*all* exhibits introduced in the arbitration hearing.' "

I misstated nothing. *Respondent here misrepresents the facts.*

The stipulation agreed upon was that Ainsworth would submit "2. All exhibits introduced in the Arbitration Hearing . . ." The stipulation made no reference whatsoever to "possible exhibits he would introduce." All exhibits clearly included the arbitrators' exhibit which was introduced into the hearing as "Arbitrators' exhibit No. 1." This exhibit included both parties' agreement to accept the panel's decision as *final*, the verified complaint, my detailed answer to the complaint, and sixteen supporting exhibits to support my answer.

Since the purpose of the trial was to determine whether the award should be vacated because of the alleged evident partiality by the arbitrators or their alleged manifest disregard of the law, was it not necessary for Ainsworth to include the arbitrators' exhibit so that the basis of their award could be judged fairly? For all practical purposes it was a trial on the conduct of the arbitrators. The transcript of the hearing, and the exhibit they presented at the hearing, were the only documents capable of defending the arbitration panel against the false allegations made against them by the Respondent.

Br. in Opp. p. 9 states "any failure by Skurnick to introduce what he deemed to be appropriate exhibits was his own fault." I had already introduced by exhibits to the arbitrators when I answered the Respondent's complaint. These in turn were introduced as evidence at the arbitration hearing. I was not on trial. When they placed their exhibit in evidence at the arbitration hearing the arbitrators provided a basis for their award.

I ask the members of this Court to consider if they had been the judge at the district court whether they would have considered rendering a decision that reflected misconduct on the part of the arbitrators without first examining their exhibit which formed the basis of their award. Did the Petitioner at the district court level properly comply with the legal requirements for proper review of his case without submitting to the Court the arbitrators' exhibit for its consideration?

Br. in Opp. p. 11 states he filed a memorandum of law, "*claiming evident partiality by the arbitrators because of a failure to take additional evidence*;"

At the conclusion of the arbitration hearing the chairman of the panel asked: "Now, if the parties do not have any further proof to offer, please state affirmatively that you have had an equal opportunity to be heard."

I replied; "I feel I have had an equal and proper opportunity to be heard." Mr. Forkey answered, "*Claimant feels likewise.*" On the basis of Forkey's reply to the arbitration panel chairman's question, his suggestion that the arbitrators were evidently partial because of *their failure to take additional evidence* is contrary to the facts.

Br. in Opp. p. 11 relates Respondent submitted a Memorandum of Law at the arbitration hearing. He falsely stated in it: "The Respondent does admit selling securities to Claimant."

I had steadfastly denied that I ever sold securities to the Claimant, Ainsworth. Had the arbitrators' exhibit been permitted to be inserted in the record, the falseness of this accusation could be readily proven.

Br. in Opp. p. 12 states: "Judgment was entered by the district court for the amount of statutory damages proved by Ainsworth without contradiction by Skurnick in the arbitration." The arbitrators' exhibit placed in evidence already contained documentary proof that Ainsworth had invested a net amount of $1,100 and the account had a value of $12,000 at the time he terminated my management of it. Furthermore, Ainsworth at the hearing, confirmed to the arbitrators in sworn testimony that his net investment of $1,100 was accurate. For this reason I felt I would be wasting everyone's time if I attempted to prove that Ainsworth's claim for damages was without merit. I was before an arbitration tribunal where both parties agreed in advance to accept the arbitrators' decision as final. I was not in a court of law which was governed by the rules of law. I went as far as necessary to prove my case to the arbitration panel, which I accomplished as evidenced by their award.

Br. in Opp. p. 13 states: "Skurnick's initial brief raised issues on appeal that were not raised in the district court or in the arbitral hearing." Until the district court vacated the arbitration award and entered a judgment against me, I had no reason to raise the issues I raised in the appellate court.

In Br. of Opp. p. 14 Respondent quotes the appellate court as saying, "the district court had no difficulty with the issues in this case, nor do we, until confronting the issue of whether the subject sales were made in Florida." I submit that this statement by the appellate court is proof that the arbitrators did not act with *manifest disregard of the law.* One requirement of manifest disregard of the law by arbitrators is that the law must be pristine clear so that its interpretation would be clear to the average reasonable man. When three appellate judges state that they had difficulties determining whether the subject sales were made in Florida and had to ask the Florida Supreme Court to make that determination for them, their action is proof that the law on this point was not absolutely clear. One must remember that this was a claim to be settled by arbitrators and in accordance with their rules and procedures, and not in a court of law under court rules and court procedures.

Br. in Opp. p. 16 says, "Skurnick . . . . again has attempted to raise issues not before the trial court such as his due process argument arising under the Fifth Amendment to the United States Constitution . . ."

The trial before the district court was brought there under the authority of 9 U.S.C. § 10 which dealt solely with vacatur of an arbitration award, and "evident partiality" as well as "manifest disregard of the law" were the grounds upon which the vacatur of the arbitration award was sought. I was prepared to defend the arbitration award against these allegations. It was only *after* the trial when the judgment that was rendered against me by the district court did not conform to any of the grounds specified in 9 U.S.C. § 11, and did not conform to the intent of the arbitrators that I was made aware of the fact that my constitutional rights had been violated.

Reference is made to Respondent's reasons for denying the writ, Br. in Opp. pp. 16, 17.

Various circuit court decisions have set standards for vacating an arbitration award on the basis of manifest disregard of the law. Therefore, it was fitting to show that the district court's decision to vacate the arbitration award on this basis did not conform to the standards set by other circuits for such action, and that it did not conform to past rulings of the Eleventh Circuit as well. It was proper to demonstrate that the arbitration panel had a rational basis for saying that Ainsworth did not prove that I had violated Florida Statute § 517.12. Thus the Securities and Exchange Act of 1934 definitions which differentiated between brokers and dealers, and the established practice in the industry provided a reasonable basis for the arbitrators in believing that Ainsworth had not established the fact that I acted as a dealer in securities. These facts and other evidence were not presented to this Court to prove that I did not violate Florida statutes but rather to prove that the arbitrators made their award on a rational basis, and that their award was neither arbitrary or capricious. It was not sufficient for Ainsworth to prove that I sold stocks to him in Florida as a dealer, and was damaged as a result of my activities on his behalf. *He also had to prove that the arbitrators knew this as a fact, and then proceeded to ignore this fact.*

Respondent, the district court, and the Appellate Court while invoking Florida Statute 517.021(9) which states "broker" means "dealer" conveniently ignore 1985 Florida Statute 517.021(9)(b)5 that states a person buying stocks exclusively through a registered exchange is not a dealer. This is merely another reason for showing that the arbitration panel had a reasonable basis for stating that the Respondent had not established his claims. Br. in Opp. p. 16 states: "Both the decision of the district court and those of the Eleventh Circuit Court of Appeals reflect the undisputed facts upon which both courts based their decisions of which Skurnick complains." This statement ignores the fact that both courts were in conflict with

each other as to the reasons for vacating the arbitration award. The district court vacated the award on the allegation that it was in manifest disregard of the law, and specifically stated that the finding of "negligence" had no bearing on its decision. The Eleventh Circuit panel on the other hand justified the vacatur of the arbitration award for the reason that it was alleged to be "arbitrary or capricious," and they based their reason that the finding of negligence compelled the arbitrators to find that I had violated Florida Statute § 517.12. Thus we do not have in this case a so-called "two court" decision. We have instead two courts which are in conflict with each other.

Respondent has not presented one valid reason, one fact, or one applicable court decision which would justify his reasons for denying the writ.

Reference is made to Br. in Opp. p. 18, entitled "Conflict with Decision of this court," dealing with the statement by the district court that the award was capable of two very different interpretations. Taking into consideration that the Supreme Court has ruled that arbitrators need not give the reasons for their award, this Court can review the original award shown as Appendix J on page 29 of my petition and determine whether its mandate is absolutely clear, or lends itself to "two very different interpretations."

Br. in Opp. p. 18 erroneously attributes my reference to *Marshall v. Green Giant* as my basis for stating that the decision of the Eleventh Circuit panel is in "conflict with decisions of other courts of appeal."

In my comment on the decision of the Eleventh Circuit in the case of *O.R. Securities v. Professional Planning* I quoted the Eleventh Circuit's decision saying, "If a court is to vacate an arbitration award on the basis of manifest disregard of the law, there must be some showing in the record, other than the results obtained, that the arbitrators knew the law and expressly disregarded it." The court indicated that this was the opinion of other appellate courts, and for this reason the Eleventh

Circuit never adopted "manifest disregard of the law" as a standard for vacating an arbitration award.

Furthermore the decision of the Eleventh Circuit panel listed decisions by the Ninth Circuit, Eighth Circuit, Fourth Circuit, First Circuit, Tenth Circuit, and Second Circuit as setting standards for vacatur of an arbitration so difficult to meet that the Eleventh Circuit rejected that standard as a ground for vacating an arbitration award.

When the Eleventh Circuit panel affirmed the vacatur of the arbitration award by the district court on the grounds of manifest disregard of the law they deviated from past decisions of the Eleventh Circuit on this issue, as well as from the rulings of all the other circuits cited by them in their decision in which they stated, "Several courts have discussed the use of a 'manifest disregard of the law' standard to vacate an arbitration award." They then proceeded to list cases in the various other circuits listed above that was the basis for their rejection of the use of that standard as a ground for vacating an arbitration award.

Thus the Eleventh Circuit panel in its decision where they cited other circuit case rulings on the subject proved that their affirmation of the district court decision to vacate the arbitration award on the basis of manifest disregard of the law was in conflict with the rulings of the other circuits cited by them on this issue.

Br. in Opp. p. 20 in his *Amicizia* and *Diapulse* references erroneously implies that I have not acknowledged manifest disregard of the law as a basis for vacating an arbitration award. This is obviously untrue as I have quoted this Court in *Wilko v. Swan* as ruling that except for manifest disregard of the law, the grounds set forth in 9 U.S.C. § 10 are the only grounds for vacating an arbitration award. I have cited these cases, Diapulse in particular, to show that courts have ruled that 9 U.S.C. § 11, dealing with the modification of "an arbitration award, does not license a district court to substitute its judgment for that of the arbitrators."

Br. in Opp. p. 20 also erroneously alleges that the district court gave the arbitrators "specific instructions . . . as to the applicable law and the requirement to award damages but they chose not to do so." Respondent here merely repeats the erroneous statement by the Eleventh Circuit panel. This Court can readily determine the facts by referring to the district court's decision in appendix B of my brief. The decision includes the court's order of remand. I have found no instructions there which required the arbitrators "to award damages" to the Respondent.

Br. in Opp. pp. 22, 23, cites the Eleventh Circuit panel's decision which was fully analyzed and argued in my brief. There is no need to prove again the panel's misapprehensions concerning negligence, alleged damages, and alleged instructions given the arbitrators by the district court. Br. in Opp. p. 24 states, "Simply put, arbitrators cannot be allowed to act in an arbitrary and capricious manner." In his entire brief he has never once presented an act, or statement by the arbitrators that the average reasonable person would classify as "arbitrary or capricious." Respondent knows very well that Florida Statute § 517.12 makes no reference to "negligence," and that the panel's misapprehension of that statute was the basis for ruling that the arbitration award was "arbitrary or capricious."

Br. in Opp. pp. 23, 24, states: ". . . it is apparent that the requirements to vacate an arbitration in the Eleventh Circuit are more stringent than in those Circuits that have adopted the manifest disregard of the law standard." That may or may not be so. This Court may have noted that in my brief, and in this reply, I have always referred to the Eleventh Circuit *panel*. After studying the Eleventh Circuit's decisions in their previous arbitration cases, I concluded that the decisions rendered were rational, and on an intellectual level that showed care and a sense of responsibility in their preparation. The decisions of the panel in this case showed such negligence in ascertaining the facts and the laws involved, and in

their reasoning that it would be unfair to the other justices of the Eleventh Circuit to hold them responsible for this panel's malfeasance, or to associate them with this panel's decision. For good cause I filed the required fifteen (15) copies of a suggestion for rehearing in banc, out of time. Fourteen (14) were returned to me after I was informed that they were not distributed to the justices of the Eleventh Circuit for their consideration. I believe that had the justices of the Eleventh Circuit had the opportunity to act on my in banc suggestion, they would have granted me a rehearing. My belief is based upon my analysis of their previous arbitration decisions.

Br. in Opp. p. 24 in his section, "Issues Raised But Not Argued" states that ". . . three separate courts have heard and considered the issues in this case . . ." Apparently, the Respondent is relying on the quantity of courts rather than the quality of their decision and of his facts and arguments.

I have previously discussed the conflicts between the decisions of the district court and the Eleventh Circuit panel. The differences were so great that it would be fair to say they agreed on nothing of significance.

In his "Conclusion," Respondent's authorities appear to be those of the courts whose decisions are being appealed. He has presented no valid argument or fact to support his conclusion.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition for certiorari, certiorari should be granted.

Respectfully submitted,

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